SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCR 2023 0042

SHEREE BECKER — Applicant

v

THE KING — Respondent

JUDGES:	EMERTON P, PRIEST JA and KIDD AJA
WHERE HELD:	Melbourne
DATE OF HEARING:	23 November 2023
DATE OF JUDGMENT:	14 December 2023
DATE OF REASONS:	21 December 2023
MEDIUM NEUTRAL CITATION:	[2023] VSCA 332
JUDGMENT APPEALED FROM:	*DPP v Becker* [2022] VCC 2058 (Judge McInerney)

CRIMINAL LAW — Appeal — Conviction — Applicant convicted of seven charges of obtaining financial advantage by deception — Mortgage fraud — Complex and document heavy trial — Interventions by trial judge during prosecution opening — Prosecution opening akin to a 'workshop exercise' — Further interventions by trial judge during witness examination — Comments made by trial judge when charging the jury — Whether trial judge entered the arena — The adversarial system — Trial judge crossed the line between

roles of judge and advocate — Interventions had the capacity to deflect the jury from giving fair and proper consideration to the defence case — Substantial miscarriage of justice — Appeal allowed — Retrial ordered.

CRIMINAL LAW — Appeal — Conviction — Whether verdict on charge 1 unreasonable or could not be supported having regard to the evidence — Prosecution case on charge 1 depended upon acceptance of truthfulness of co-offender's account — Where jury accepted co-offender's evidence as credible and reliable — Whether improbabilities of co-offender's account arise by reason of other evidence — Whether there was unchallenged inconsistent evidence — Combined force of evidence capable of establishing guilt — Leave to appeal refused.

Counsel

Applicant:	Mr D Dann KC with Mr P Smallwood
Respondent:	Ms D Piekusis KC with Ms B Goding

Solicitors

Applicant:	Galbally & O'Bryan
Respondent:	Ms A Hogan, Solicitor for Public Prosecutions

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EMERTON P
PRIEST JA
KIDD AJA:

PART A: INTRODUCTION

1 The applicant, Sheree Becker, was charged on indictment with seven charges of obtaining financial advantage by deception. She entered pleas of not guilty.

2 Following a 22-day trial in the County Court of Victoria, the applicant was convicted on each charge.

3 On 2 September 2022, the applicant was sentenced to a total effective sentence of 3 years and 6 months' imprisonment, with a non-parole period of 15 months.

4 The applicant applied for leave to appeal against conviction. Leave to appeal was sought on two grounds:

> **Ground 1.** The trial of the applicant miscarried as a result of the unbalanced treatment of the prosecution case as opposed to the defence case by the learned trial judge.
>
> **Ground 2.** The guilty verdict on charge 1 was unreasonable or cannot be supported having regard to the evidence.

5 As will become apparent, the trial was a difficult one. It was document heavy and required all involved to familiarise themselves with a multiplicity of contracts, financial instruments, and the workings of a computer system used to approve home loan applications.

6 Despite the best efforts of the parties, the trial proceeded in a way that was inimical to the principles of adversarial justice. The line between permissible and impermissible judicial intervention and comment was crossed. The result was that the applicant did not receive a fair trial according to law.

7 We heard application for leave to appeal on 23 November 2023.

8 On 14 December 2023, we made orders granting leave to appeal. We allowed the appeal, ordered that the convictions be set aside, and ordered a new trial. We indicated that we would publish our reasons on a later date.

9 These are our reasons for those orders.

PART B: THE FACTS

10 The applicant was charged on indictment with seven offences of obtaining financial advantage by deception, contrary to s 82(1) of the *Crimes Act 1958*.

(1) The prosecution case at trial

11 The applicant was a licenced real estate agent. She also held an Australian credit licence, which authorised her to provide credit and to assist with, or suggest, credit contracts. The applicant conducted her business through a company trading as Again Investments Pty Ltd ('Again Investments').

12 At trial, the prosecution alleged that the applicant engineered a scheme to maximise customers' chances of securing home loans from the Australia and New Zealand Banking Group ('ANZ'). The scheme, which involved the applicant simultaneously acting for both vendors and purchasers, entailed the submission of home loan applications that contained false representations.

13 The prosecution alleged that the applicant entered into an agreement, arrangement, or understanding with Rama Akkala to implement the scheme. Akkala was a 'loan introducer' who had experience referring prospective borrowers to ANZ. One of Akkala's contacts at ANZ was Ankur Anand. The prosecution did not suggest that Anand was knowingly involved in the scheme. He did, however, play an important part. The prosecution alleged that the applicant, Akkala and Anand assumed the following roles:

(a) The applicant represented both the vendors and purchasers of real property.

(b) The applicant would prepare, among other things, contracts of sale.

(c) The applicant would provide documents, including the contracts of sale, to Akkala.

(d) Akkala would, where necessary, create false payslips to ensure prospective borrowers appeared to have the financial means to service a home loan.

(e) Akkala would provide the documents, including the false payslips, to Anand.

(f) Akkala would arrange for prospective borrowers to meet with Anand.

(g) Anand would prepare the documentation and information that was required by ANZ to assess loan applications using its computer system. Anand would feed the information into that system.

14 Once submitted, ANZ's computer system would assess the information provided and make a determination on the home loan applications. The system was automated; it was programmed to assess loan applications in accordance with ANZ's policy. Some applications could be approved by the computer system without manual intervention or further assessment.

15 The prosecution alleged that the applicant adopted a particular business practice to give effect to the scheme. Proof of the business practice was not integral to the prosecution case; it was relied upon to contextualise the conduct forming the basis of each charge. The business practice was, however, a central plank of the defence case at trial. It is therefore necessary to set it out in some detail. The core components of the business practice included the following:

(a) The applicant, through Again Investments, would enter into joint venture agreements with homeowners who wanted to sell their properties. The homeowners often had large mortgages and high interest rates; they were eager to sell. Pursuant to the joint venture agreements, the applicant agreed to find purchasers. In some cases, the owners gave the applicant — and, in respect of charge 2, the applicant's father — power of attorney authorising her to deal with the property on their behalf. The

applicant agreed to take over responsibility of the properties, including the mortgages and mortgage repayments.

(b) The applicant and the owners would agree on an amount the owner would receive upon the sale of the property (although, in the case of charge 3, the owner of the property received an upfront payment). Sometimes, the amount agreed was the entirety of the amount owing on the mortgage; other times, the amount agreed exceeded the balance of the mortgage. The applicant would profit from the joint venture agreements by retaining the difference between the sale price and the amount owing to the homeowner under the agreement.

(c) Having struck an agreement with a homeowner, the applicant would attempt to sell the property. In cases where she could not find a purchaser, and as a measure to service the mortgages in accordance with her obligations under the joint venture agreements, the applicant entered into either 'rent-to-own'[1] contracts or option agreements with her clients (prospective purchasers / borrowers). Each contract differed in its terms. However, they generally provided for the following:

(i) a client would agree to purchase the property through instalments or have an option to purchase it (when they were in a position to obtain finance);

(ii) the client would make periodic instalments — part of the sum representing rent; another part representing a contribution towards the purchase of the property; and

(iii) the client was entitled to exclusive possession of the property.

(d) The prosecution suggested that, at some point, the applicant decided that she wanted to convert her clients' contracts into standard contracts of sale (i.e., the purchase price is paid in full, rather than by instalments, and the property is transferred upon settlement). In its opening and closing addresses, the prosecution referred to evidence given by Akkala, namely, that the applicant 'wanted to get out of that area, as the regulators did not like those type of contracts.' Whilst this was disputed by the applicant, it was common ground that she converted a number of contracts to standard contracts of sale. To do so, she sought the assistance of Akkala and Anand. Together, the three of them went about obtaining loans for her clients (borrowers).

(e) Before the loan applications were made, the applicant and her clients (borrowers) would agree on a purchase price and a contract of sale would be drawn up. The contract of sale particularised the deposit paid by the purchaser. In the sale of each property the subject of a charge (save for charge 1), the purchaser had not paid the deposit, or had not paid the deposit in full.

(f) When a client (borrower) did not have sufficient finance to pay the purchase price (because they did not pay the deposit before a loan was granted), the applicant, through Again Investments, would loan them either: (a) the deposit amount; or (b) the balance of funds required for the sale. That is, the client would obtain two loans: one from ANZ; and one from Again Investments. Again Investments would, of course, be entitled to interest on the amount loaned. On the prosecution case, the practical effect of a loan from Again Investments was that a client had not paid the deposit (either in

1This was the term used at trial. The term used in Division 5 of Part 1 of the *Sale of Land Act 1962* is 'rent-to-buy arrangement'. For consistency, we use 'rent-to-own'.

part or in full) stipulated on the contract of sale at the time the loan application was made to ANZ.

16 As noted above, the prosecution contended that the applicant wanted 'to leave the rent-to-own area'. The trial prosecutor suggested that the applicant was in a 'catch-22' situation — her clients had entered rent-to-own agreements because they could not obtain finance to purchase the properties, but, in order to get out of the area, she needed her clients to obtain finance and purchase the properties under standard contracts of sale. The prosecution alleged that, in order to achieve this, the applicant pursued a course of dishonesty.

(a) Charge 1

17 In August 2014, Mwamba Kande agreed to purchase a property in Tarneit for $460,000. The applicant was the real estate agent managing the sale. Kande had not obtained finance, but he did have available $70,000 to contribute towards the property. The applicant referred Kande to Akkala. At the time, Kande did not have payslips that could be used to support an application for a home loan. The prosecution alleged that Akkala, having been urged to do so by the applicant, created false payslips. The false payslips were submitted to ANZ as part of the loan application.

18 Anand submitted the home loan application, which was approved by ANZ. On 15 October 2014, Kande accepted a home loan of $381,181.10.

19 The prosecution alleged that the applicant was guilty of the offence by virtue of joint criminal enterprise at common law. The prosecution argued that she entered into an agreement, arrangement or understanding with Akkala to dishonestly obtain a financial advantage for Kande.

20 The applicant was convicted on charge 1.

(b) Charge 2

(2) In early 2009, Again Investments entered into a joint venture agreement with the owner of a property in Maddingley. In June that year, Imakulata Pavihi agreed to purchase the property for $258,000. The property was purchased under a rent-to-own contract. The contract was countersigned by the applicant's father, who held a power of attorney executed by the owner of the property. Several years passed, but Pavihi was unable to obtain finance. She did, however, continue making weekly payments under the rent-to-own contract between 2009 and 2014.

21 In 2014, Pavihi approached the applicant and indicated that she wanted to terminate the agreement. In response, the applicant suggested that Pavihi's eldest daughter, Too-A Leiataua, could purchase the property and apply for a home loan. At the time, Leiataua was an unemployed university student. The prosecution argued that the applicant was aware of Leiataua's circumstances.

22 On 17 September 2014, Leiataua signed a contract of sale for the purchase of the Maddingley property. The contract of sale was countersigned by the applicant's father, who was acting under a power of attorney. The purchase price was $315,000, and the deposit listed on the contract of sale was $63,000. The contract of sale stated that the deposit had been paid in full.

23 The prosecution alleged that the deposit was never paid. The prosecution acknowledged that Pavihi had made a number of instalments under the rent-to-own contract. However, it argued

that: (a) the instalments fell well short of $63,000; and (b) in any event, the rent-to-own contract was a contract between the owner and Pavihi, while the contract of sale was a contract between the owner and Leiataua.

24 The applicant then provided the contract of sale and other documentation to Akkala, who, in turn, provided them to Anand. The prosecution alleged that Akkala, who was acting in furtherance of an agreement he had struck with the applicant, produced false payslips to give to Anand as part of Leiataua's home loan application. Anand submitted those documents in support of the application.

25 Anand submitted the home loan application, which was approved by ANZ. On 30 October 2014, Leiataua accepted a home loan of $252,000.

26 The applicant was convicted on charge 2.

(a) Charge 3

(3) In August 2014, the applicant, acting pursuant to a power of attorney granted to her under a joint venture agreement, entered into a rent-to-own contract with Chantal Irakoze for the purchase of a property in Truganina. In accordance with that contract, Irakoze paid an initial deposit of $10,000, and thereafter made monthly instalment payments of approximately $1,354.

27 Irakoze gave evidence at trial that she made three additional payments to the applicant in the amounts of $10,000, $3,000, and $6,000.

28 In November 2014, the applicant contacted Irakoze and told her that she (Irakoze) would be able to obtain a mortgage to purchase the property. On 6 November 2014, Irakoze signed a standard contract of sale for the purchase of the Truganina property. The contract was countersigned by the applicant, who was acting under a power of attorney. The purchase price was $435,000, and the deposit listed on the contract of sale was $65,000.

29 The contract of sale stated that $370,000 was payable upon settlement. The prosecution argued that, by stating that $370,000 was owing, the contract implied that the deposit had been paid in full. The prosecution acknowledged that Irakoze had made a number of instalments under the rent-to-own contract. However, it argued that, on the most favourable estimate, the amount paid by Irakoze totalled $29,000, which was well short of $65,000.

30 On the same day the contract of sale was signed, Irakoze signed a loan agreement with Again Investments for the sum of $65,000. The prosecution relied upon the loan from Again Investments as evidence that Irakoze did not pay the deposit as stated in the contract of sale.

31 The applicant provided the contract of sale to Akkala, and arrangements were made for Irakoze to see Anand. Anand also received false payslips, which were produced by Akkala. The prosecution said that Akkala produced the false payslips in accordance with an agreement between him and the applicant.

32 Anand submitted the home loan application, which was approved by ANZ. On 12 November 2014, Irakoze accepted a home loan of $368,556.70.

33 The applicant was convicted on charge 3.

(a) Charge 4

(4) In August 2012, Ropati Iva entered into an option agreement with Again Investments for the purchase of a property in Melton for an exercise price of $389,000. The option was valid for 24 months. Iva paid an initial deposit of $7,000, and thereafter paid instalments of $650 per week.

34 In 2014, Iva told the applicant that he found the arrangement stressful and wanted to terminate the contract. The applicant told Iva that the price of the property was $389,000, and that he was about $38,000 short of a deposit. There was some manoeuvring, and, on 25 June 2014, Iva signed a contract of sale for the purchase of the Melton property. The price recorded on the contract was $389,000, and the deposit was $15,000. A notation next to the deposit stated 'PAID'.

35 Settlement did not occur in accordance with the contract signed on 25 June 2014. Iva was upset with the applicant, and, in a bid to resolve the issue, the applicant referred Iva to Akkala.

36 On 5 November 2014, Iva signed a contract of sale for the purchase of the Melton property for $405,000.

37 He was required to pay a deposit of $40,500. However, Iva gave evidence that the applicant told him that he would only have to pay $389,000, as previously agreed. The prosecution argued that the purchase price on the contract was inflated in order to increase the chances of ANZ approving the loan.

38 The contract of sale also included a special condition. The special condition was an acknowledgment by the parties that $15,000, representing part-payment of the deposit, had been paid by Iva by way of instalments made under the option agreement.

39 Save for what was recorded in the special condition, the contract of sale did not expressly state that the deposit had been paid. However, it did state that the balance payable at settlement was $364,500. The prosecution argued that the contract implied that the deposit had been paid in full.

40 The prosecution acknowledged that Iva contributed $15,000 to the deposit. However, it pointed out that $15,000 fell well short of the deposit required under the contract.

41 Iva provided three payslips to Anand when he met with him at ANZ. Prior to Anand submitting the loan application, Akkala said that he was contacted by Anand, who raised concerns about the payslips. Akkala said that, because the payslips were handwritten, they did not comply with ANZ's policy; they could not be used to support the application. According to Akkala, he relayed that information to Becker, who told him to 'just fix it'. Akkala spoke to Anand about the issue, and Anand sent him a blank payslip template, which was in a form that ANZ might accept. Akkala populated a number of templates with the information recorded in the handwritten payslips supplied by Iva. He then provided them to Anand. The prosecution contended that, at the time he forged the payslips, Akkala was acting in furtherance of an agreement between him and the applicant.

42 Anand submitted the home loan application, which was approved by ANZ. On 16 November 2014, Iva accepted a home loan of $336,810.81.

43 The applicant told Iva that he needed to take out a second mortgage to pay the balance of the

purchase price, and, on 27 November 2014, he entered into a loan agreement with Again Investments for $43,110.65. The prosecution said that the loan agreement was evidence that Iva did not pay the deposit as stated on the contract of sale.

44 The applicant was convicted on charge 4.

(a) Charge 5

45 On 7 August 2014, Dave Edmondson entered into a contract for the purchase of a property at Tatura. The applicant was managing the property pursuant to a joint venture agreement between Again Investments and the owner. The contract was a rent-to-own contract, with Edmondson agreeing to purchase the property for $335,000. The contract required Edmondson to pay a deposit of $10,800 comprised of an upfront payment of $3,000 and 156 weekly payments of $50. He was also required to pay $550 per week, which went towards the owner's mortgage.

46 Edmondson also signed a second contract on 7 August 2014. The contract was countersigned by the applicant, who was acting under a power of attorney. The second contract was a standard contract of sale, with a purchase price of $335,000 and a deposit of $33,500. The applicant prepared a deposit receipt, also dated 7 August 2014, for $33,500.

47 Edmondson continued making instalments under the rent-to-own contract. In September 2014, the applicant told him that she had a mortgage broker who had looked at the figures and could get him a loan to purchase the property. The applicant referred Edmondson to Akkala.

48 On 24 October 2014, the applicant — acting under a power of attorney — signed a third contract, being another contract of sale, with Edmondson for the purchase of the Tatura property. The purchase was subject to finance. The purchase price was $335,000, and the contract stated that a deposit of $33,500 had been paid.

49 That day, Edmondson and his partner also entered into a loan agreement with Again Investments for the advance of $40,000.

50 The prosecution alleged that the deposit was not paid. The prosecution acknowledged that Edmondson had made a number of instalments under the option agreement. However, the prosecution said that, on the most generous estimate, Edmondson had only paid a total of $3,500, which was well-short of the deposit required under the contract of sale.

51 The applicant provided Akkala with the contract of sale (the third contract) and the deposit receipt dated 7 August 2014. Anand used those documents as part of the home loan application.

52 Anand submitted the home loan application, which was approved by ANZ. On 23 November 2014, Edmondson accepted a home loan of $301,209.57.

53 The applicant was convicted on charge 5.

(b) Charge 6

(5) On 19 September 2014, the applicant, acting under a power of attorney, entered into a rent-to-own contract with Sioeli Fahina for the purchase of a property in Epping. The agreed price was $459,000. Pursuant to the contract, Fahina was required to pay a $22,950 deposit, which was comprised of an upfront payment of $9,000 and 156 weekly instalments of $89.43. Fahina was also required to pay $450 per week for rent, and approximately $90 per week for

other liabilities attached to the property.

54 A couple of months later, the applicant told Fahina that he could purchase the property and that Again Investments could give him a mortgage advance. On 12 November 2014, Fahina and his wife signed a loan agreement with Again Investments for $42,005.28.

55 On 18 November 2014, Fahina signed a contract of sale for the purchase of the Epping property. The contract was countersigned by the applicant, who was acting under a power of attorney. The purchase price was $495,000, with the contract stating that a deposit of $49,500 had been paid. The prosecution argued that the deposit was not paid.

56 The prosecution acknowledged that Fahina paid an initial deposit of $9,000 under the rent-to own contract, as well as weekly instalment payments. However the prosecution argued that the payments made by Fahina fell well-short of the $49,500 deposit required under the contract of sale.

57 The applicant forwarded the contract of sale, and other documents, to Akkala. Akkala then created false payslips, which he provided, along with the contract of sale and other documents, to Anand. Anand met with Fahina, had him sign some documents, and then submitted the loan application (which included the contract of sale and payslips).

58 Anand submitted the home loan application, which was approved by ANZ. On 26 November 2014, Fahina accepted a home loan of $419,043.92.

59 The applicant was convicted on charge 6.

(a) Charge 7

(6) On 7 September 2013, the applicant entered into a contract with Aiona Vi for the purchase of a property in Laverton. The nature of the contract was the subject of some discussion between the trial judge and the trial prosecutor. The trial prosecutor characterised the contract as a rent-to-own contract, while the trial judge characterised it as an option to purchase. The uncertainty about the nature of the contract does not need to be resolved on this appeal. It did, however, give rise to an intervention that is the subject of complaint. We return to this below.

60 Pursuant to the contract, Vi would acquire an option to purchase the property upon the payment of $33,548. Vi was required to pay $5,000 upfront, with the balance to be paid by way of weekly payments of $183. Vi was also required to pay rent of $350 per week. The option to purchase was valid for 36 months.

61 At some point after they entered into the contract, the applicant informed Vi that she (Vi) could get a loan for a deposit to purchase the house. However, because of Vi's credit history, the applicant recommended that Vi's son — Ongoi Moeaki, who was 20 years old — be named as the purchaser.

62 The applicant then arranged for the owner of the Laverton property to loan the family $30,000 as a mortgage advance. The loan agreement was signed on 23 November 2014.

63 On 24 November 2014, Moeaki signed a contract of sale for the purchase of the Laverton property for $425,000, with the contract stating that a deposit of $42,500 had been paid. The vendor countersigned the contract on 25 November 2014. The prosecution argued that the deposit was not paid.

64 The contract of sale signed by Moeaki included a special condition. The special condition was

an acknowledgment by parties that $26,000 of the deposit had accrued by way of works to the property completed by Moeaki. The prosecution contended that neither Moeaki, nor members of his family residing at the Laverton property, completed the works.

65 The prosecution acknowledged that Vi paid an initial deposit and made a number of instalments under the option agreement. However, on a generous estimate, the total amount paid by Vi was $17,500, which was well-short of the deposit of $42,500 required by the contract of sale.

66 The applicant provided the contract of sale to Akkala, who, in turn, provided it to Anand. Akkala also provided Anand with false payslips.

67 Anand submitted the home loan application, which was approved by ANZ. On 26 November 2014, $340,000 was distributed to Moeaki.

(a) Available pathways to guilt

68 As to charge 1, on the prosecution case, the pathway to guilt available was that the jury could reason that the applicant made a false representation by holding out the payslips to be genuine. The applicant's liability with respect to this false representation was *joint liability*, with Akkala's conduct being attributed to her by virtue of their agreement, arrangement or understanding.

69 The way the prosecution particularised charges 2, 3, 4, 6 and 7 gave rise to two pathways to guilt. They were:

(a) First, the jury could reason that the applicant made a false representation as to a deposit having been paid by the purchaser. The applicant's liability with respect to this particular was *direct*.

(b) Second, the jury could reason that the applicant made a false representation by holding out the payslips to be genuine. The applicant's liability with respect to this particular was *joint*, with Akkala's conduct being attributed to her by virtue of their agreement, arrangement or understanding.[2]

70 Charge 4 had a third particular, which gave rise to a third pathway to guilt. The prosecution alleged that the contract of sale falsely represented that the purchaser had agreed to purchase the property for $405,000. The applicant's liability with respect to this particular was *direct*.

71 Charge 5 was also particularised in a way that gave rise to two pathways to guilt:

(a) First, the jury could reason that the applicant made a false representation as to a deposit having been paid by the purchaser. The applicant's liability with respect to this particular was *direct*.

(b) Second, the jury could reason that the applicant made a false representation by producing a false deposit receipt. The applicant's liability with respect to this particular was also *direct*.

72 The jury was given an extended unanimity direction in respect of charges 2 to 7.[3] The trial

2*Crimes Act 1958*, s 324.

3*Magnus v The Queen* (2013) 41 VR 612; [2013] VSCA 163.

judge directed the jury that, to return a verdict of guilty, the jury had to be unanimous as to at least one of the false representations particularised in each of those charges.

(7) The applicant's case at trial

(a) The deposits particular (charges 2, 3, 4, 5, 6 and 7)

73 It seems the applicant's defence case initially extended to the hypothesis that the deposits particularised in the contracts of sale had relevantly been paid and that there were no false representations made relating to the payment of the deposits.

74 There were two sources of money which made up the deposits.

75 The first source was the money paid by the purchasers under the so-called previous rent-to-own or option-to-buy agreements or from other miscellaneous sources paid by them.

76 The second source of funds came from the secondary loans made to the clients (borrowers). In relation to charges 3, 4, 5, and 6, these were loans made from the applicant's company, Again Investments, to the clients (borrowers). In relation to charge 7, there was a loan made from the vendor to the client (borrower). These have been summarised above under each charge.

77 It was ultimately accepted by the applicant that the secondary loans must be accumulated with other credits and payments in order to make up the deposit figures particularised in the contracts of sale. In other words, without the secondary loans, it was accepted that the deposits under the contracts of sale were not in fact paid.

78 If the secondary loans could not be used towards the making up of the deposits, it was the applicant's case that she may have *believed* that it was permissible that the secondary loans could be accumulated with other credits and payments to make up the deposit figures particularised in the contracts of sale. In the circumstances, the prosecution had (at least) not proved she had the relevant state of mind in relation to the falsity of representations that deposits had been paid.

79 After the conclusion of the evidence, and prior to the addresses, the judge had ruled that the secondary loans could not in law or in fact be accumulated with other credits and payments to make up the deposits particularised in the contracts of sale.[4]

80 As a result of that ruling, the defence case in relation to the deposits narrowed to become focused upon the applicant's state of mind.

(b) The payslips and income particulars (charges, 1, 2, 3, 4, 6 and 7)

81 In relation to the false representations concerning the authenticity of the purchasers' payslips (and income) (charges, 1, 2, 3, 4, 6 and 7), the principal defence case was that the applicant

4This ruling is not challenged on this application. We do not see the need to descend into the detail of the ruling. The principal reason given by the trial judge was that the secondary loans had an advance date after the date of the contracts of sale (when the representations as to the deposits were made). The judge ruled that the secondary loans could not retrospectively be used to make up the deposits.

had no knowledge of their falsity. These were the product of the witness, Akkala. The applicant was not party to any understanding or arrangement with Akkala to falsify the payslips or to make false representation about the income. The applicant's case emphasised that the prosecution case in this respect relied entirely on the word of Akkala.

(c) Causation

82 All home loan applications in this case were approved by ANZ's computer system. Evidence about the operation of ANZ's computer system, which was known as 'MAX', was given by Anand and Richard Carswell, a senior credit support manager at ANZ.

83 The operation of MAX and the ANZ loan approval process can be broadly summarised as follows:

(a) When calculating a prospective borrower's loan-value-ratio, MAX deducted the funds already available to the purchaser, or the funds that *would* be available to the purchaser at settlement, from the purchase price. The funds available to the purchaser — whether at the time of the application or at settlement — could be entered into three fields, namely, 'own funds', 'deposit paid' and 'gifts'. Provided something was entered into one of those three fields, which had the result of yielding a loan-to-value ratio of 85 per cent or less, MAX would approve the loan.

(b) Carswell gave evidence that, if a deposit were paid by the purchaser, it did not necessarily have to be entered into the 'deposit' field; it could, for example, be entered into the 'own funds' field. He agreed with the proposition, put to him by defence counsel, that 'it matters not whether the deposit's been previously paid or whether own funds are going to be paid at settlement'. If the 'deposit' field is blank but there is an amount in the 'own funds' field, the system is being told that … the purchaser's own funds would be made available at settlement'.

(c) ANZ did not make enquiries with prospective borrowers' employers to confirm their employment arrangements; it took the payslips at face value.

(d) ANZ did not take steps to verify whether deposits had in fact been paid. That was not its policy. Further, a deposit did not have to be entered into MAX in order for an application to proceed.

(e) An offer for a home loan cannot be generated until ANZ had received a contract of sale.

(f) ANZ would not have approved an application for a home loan if it was aware that the application contained false information.

84 As best we understand it, the applicant's defence argued that the false representations as to the deposits and payslips could not, as a matter of fact, have caused ANZ to grant home loans to the applicant's clients (borrowers). That is because:

(a) ANZ did not verify information provided by prospective borrowers about their employment arrangements; and

(b) ANZ did not *require* deposits to be paid before a loan application was granted (because, as above, MAX was primarily concerned to ensure that the loan-to-value ratio was 85 per cent, which was a figure derived at by deducting from the purchase

price any figure entered into one or more of the 'deposit paid, 'own funds' or 'gifts' fields),

85 The prosecution, on the other hand, pointed to the evidence given by Anand and Carswell: ANZ would not have granted a loan if it was aware that documents or information provided in support of an application, including contracts of sale, contained falsities.

PART C: GROUND 1

86 Under cover of ground 1, the applicant contends that:

> The trial of the applicant miscarried as a result of the unbalanced treatment of the prosecution case as opposed to the defence case by the learned trial judge.

(8) The essence of ground 1

87 This case is principally about the parameters of permissible judicial intervention in our system of adversarial justice.

88 Under this ground, the applicant contends that a substantial miscarriage of justice was occasioned by a combination of impermissible judicial interventions during the opening address of the prosecutor (and, to a lesser extent, during the running of the trial), and an unbalanced charge.

89 This conduct gave rise to an appearance of the judge being aligned to the prosecution case, and thus being seen to adopt, to some degree, the role of the prosecutor.

90 Overall, the trial judge, the applicant argues, failed to maintain or hold 'an even balance'[5] between the cases of the prosecution and the applicant.

91 In particular, this ground raises for consideration:

(a) The question of impermissible judicial interventions by a trial judge during the opening address of the prosecutor.

(b) The question of when comments made by the trial judge in the charge transgress the scope for permissible judicial comment.

92 It is therefore necessary to canvass the legal principles concerning impermissible judicial intervention, and to revisit what the High Court said in *McKell*.

(9) Parties' arguments

93 We summarise below, in general terms, the arguments made on appeal. While the arguments can be distilled to a number of general propositions, they need to be considered in the context of specific interventions which, in turn, must be viewed in the context of the trial as a whole. Thus, we will address the more targeted arguments made by the parties as we engage in an analysis of the trial judge's interventions.

5*McKell v The Queen* (2019) 264 CLR 307, 319–20 [35]; [2019] HCA 5 ('*McKell*').

(a) The applicant

94 The applicant's ultimate submission was that the trial judge's interventions culminated in a trial that was unbalanced and unfair. She contends that the trial judge crossed the line between permissible and impermissible judicial intervention, effectively entering the arena and adopting the mantle of prosecution counsel. In combination with certain comments made by the trial judge throughout the trial, this was productive of a substantial miscarriage of justice.

95 The applicant made four broad submissions to support her contention, which largely rested on foundational principles of our system of adversarial justice.

(a) *First*, the applicant said that the trial judge's interventions went 'way beyond' points and questions or clarification, and 'travelled into the realm of pulling th[e] prosecution case into shape'. This was the prosecution's role, not the judge's. These interventions were not, in the applicant's submission, confined to attempts to clear up ambiguities or uncertainties in the evidence; they had the effect of adding force and meaning to the prosecution case.

(b) *Second*, and acknowledging that this Court's principal task is to assess the quality or substance of the interjections, rather than to engage in some form of statistical analysis, the applicant submitted that: (a) a pattern emerged whereby the trial judge engaged in an exercise of recapitulating (often with added emphasis) aspects of the prosecution case as they were set out by the prosecutor; and (b) the judge harboured scepticism about the defence case, which, by his interjections, would (or may) have been conveyed to the jury.

(c) *Third*, the trial judge — and not the prosecutor — raised the spectre of illegality or impropriety with respect to the applicant's business model, including in the presence of the jury. He did so at a number of points during the trial.

(d) *Fourth*, the trial judge adopted an approach to the charge whereby his Honour:

(i) summarised the prosecution's arguments;

(ii) summarised the defence arguments; and

(iii) would, in the course of summarising the defence arguments, present arguments in rebuttal.

(b) The effect of this was twofold. It had the effect of diminishing the defence case. It also had the effect of converting the charge into what was, practically speaking, a third prosecution address.

(b) The respondent

96 The respondent did not set out to defend what occurred in this case during the prosecutor's opening, which the respondent accepted as 'highly unusual'.

97 However, the respondent argued that the trial judge was bound to ensure that the case for each party was presented in a way that enabled the jury to follow the evidence. Viewed in context, the respondent submitted that the trial judge's interventions served to do no more than that.

98 Indeed, context was a theme that ran through the respondent's submissions on this appeal. The respondent argued that the import of the judge's interventions needed to be assessed by

reference to the trial as a whole, not in isolation.

99 The respondent rejected the proposition that the trial judge's interjections added force or meaning to the prosecution case. In its submission, the interjections — especially those during the prosecution opening — were apt to undermine the competence and integrity of the *prosecutor*.

100 The respondent also rejected the submission that the trial judge's references to the legality of the applicant's business model occasioned unfair prejudice. The respondent contended that any prejudice was cured by statements made by both the trial judge and prosecutor, which, in effect, made it clear to the jury that the legality or otherwise of rent-to-own contracts was irrelevant to their task.

101 In relation to the judge's charge, the respondent argues that the references to the prosecution arguments when dealing with the defence case did no more than focus the jury's attention on the real issues in dispute.

(10) Legal principles

(a) Judicial intervention

102 As Livesey P summarised in *Roberts v The Queen*,[6] a complaint of this kind must be evaluated

> having regard to certain essential features of a criminal trial. The first is that the jury, and not the trial judge, is tasked with finding the facts; the jury is "the constitutional tribunal for deciding issues of fact". Secondly, the issues in contest, and the evidence to be led at trial, are determined by the parties, not the trial judge. Whilst the judge may make rulings in the course of what is an adversarial contest, those rulings are based on what the parties put forward, whether by way of evidence or argument. Thirdly, from start to finish it is necessary that the trial judge be and be seen to be both independent and impartial.[7]

103 The permissibility of the interventions of a trial judge thus fall to be assessed in 'an adversarial context, in which it is the parties who are the protagonists and hence who dictate the forensic landscape against which the facts fall to be determined'.[8]

104 As Barwick CJ explained in *Ratten v The Queen*:[9]

> As Smith J rightly said in expressing the reasons of the Full Court in this case, "Under our law a criminal trial is not, and does not purport to be, an

6*Roberts v The Queen* (2022) 141 SASR 73; [2022] SASCA 36.

7*Roberts v The Queen* (2022) 141 SASR 73, 77 [1]; [2022] SASCA 36 (footnotes omitted).

8*Roberts v The Queen* (2022) 141 SASR 73, 86–7 [63] (Doyle JA); [2022] SASCA 36.

9*Ratten v The Queen* (1974) 131 CLR 510, 517 (Barwick CJ); [1974] HCA 35; *R v Esposito* (1998) 45 NSWLR 442, 469–470 (Wood CJ at CL).

> examination and assessment of all the information and evidence that exists, bearing on the question of guilt or innocence". It is a trial, not an inquisition: a trial in which the protagonists are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility. The judge is to take no part in that contest, having his own role to perform in ensuring the propriety and fairness of the trial and in instructing the jury in the relevant law. Upon the evidence and under the judge's directions, the jury is to decide whether the accused is guilty or not.

105 The judge must not become involved in questioning 'to the extent that the judge appears to have become partisan or has formed a view about the evidence';[10] still less should the judge appear to have assumed the role of prosecutor.[11] Conduct such as this risks a miscarriage of justice.

106 It is a fine line between what may be acceptable intervention by a trial judge to ensure a jury understands technical issues in a case, and when a judge goes beyond the scope of permissible intervention in the conduct of a trial. As Wood CJ at CL in *R v Esposito*[12] observed:

> The line that a trial judge walks when asking questions of a witness is a narrow one. There is nothing wrong with questions designed to clear up answers that may be equivocal or uncertain, or, within reason, to identify matters that may be of concern to himself. However, once the judge resorts to extensive questioning, particularly of the kind that amounts to cross-examination in a criminal trial before a jury, then he is treading on thin ice. The thinness of the ice will depend upon the identity of the witness being examined (here the person on trial), and on whether the questions appear to be directed to elucidating an area of the evidence that has been overlooked or left in an uncertain or equivocal state, or directed towards establishing a point that is favourable or adverse to the interests of one or other of the parties.[13]

107 Recently, this Court in *Nwagbo v The Queen*,[14] having surveyed the authorities, catalogued the relevant principles which govern the limits of a trial judge's permissible intervention in the conduct of a trial:

10*Roberts v The Queen* (2022) 141 SASR 73, 78–9 [9]; [2022] SASCA 36.

11See generally *R v Esposito* (1998) 45 NSWLR 442, 472 (Wood CJ at CL); *R v MacBeth* [2008] SASC 71, [72]–[74] (Doyle CJ, with whom Bleby and Gray JJ agreed); *R v L, GA* [2015] SASCFC 166, [115]–[116] (Sulan, Peek and Lovell JJ).

12*R v Esposito* (1998) 45 NSWLR 442, 467–72 (Wood CJ at CL), 477–78 (James J), 478 (Adams J).

13*R v Esposito* (1998) 45 NSWLR 442, 472 (Wood CJ at CL).

(a) Whether judicial intervention will constitute a substantial miscarriage of justice will always be a question of fact and degree.

(b) An adversarial system prescribes distinct roles to counsel and the judge, and the role of the judge is circumscribed by the dynamics of the adversarial system.

(c) In jury trials, judges should be especially careful to avoid unnecessary intervention in the presence of the jury.

(d) Judicial intervention in the presence of the jury ought not descend to denigration of counsel or counsel's case.

(e) A judge must not give the appearance of adopting the role of a party to the proceeding, nor appear as if that party's partial advocate.

(f) A judge must not shape the content of a trial, save for procedural or evidentiary rulings. Hence, a judge must not endeavour to fill gaps in a party's case, examine areas that the parties have left alone, nor endeavour to impact upon a witness's credit.

(g) A judge may intervene in order to understand technical issues in a case, or to endeavour to clarify those issues for the jury.

(h) A judge may intervene to maintain proper control over proceedings.[15]

108 The Court went onto confirm[16] (by reference to what had been said in *R v Mawson*[17]) the potential consequences should this line be crossed, saying it 'is clearly established by a long line of authority that excessive interference or involvement by a trial judge in the conduct of a trial may constitute such a departure from the due and orderly processes of fair trial as to amount to a miscarriage of justice',[18] and that such a departure 'may infringe another fundamental principle of criminal law, namely, that criminal justice must not only be done but must also appear to be done'.[19]

109 What is clear is that judicial circumspection is demanded 'particularly in a criminal trial by

14*Nwagbo v the Queen* (2021) 288 A Crim R 516, 526–27 [38] (Priest, Niall and T Forrest JJA); [2021] VSCA 93.

15*Nwagbo v the Queen* (2021) 288 A Crim R 516, 526–27 [38] (Priest, Niall and T Forrest JJA); [2021] VSCA 93.

16*Nwagbo v the Queen* (2021) 288 A Crim R 516, 525 [35] (Priest, Niall and T Forrest JJA); [2021] VSCA 93.

17*R v Mawson* [1967] VR 205, 207 (Winneke CJ, Adam and Barber JJ).

18*R v Mawson* [1967] VR 205, 207 (Winneke CJ, Adam and Barber JJ).

jury', which 'creates an especial risk of producing an unfair trial'.[20]

110 Some matters require further emphasis having regard to the considerations raised in this case.

111 First, a judge should not, through questioning, convey scepticism about a witness's evidence or his or her credibility.[21] Such clarifying interventions should always be calculated to 'promote the orderly elicitation of the evidence, not needlessly [interrupt] its flow'.[22]

112 Second, it is impermissible for a judge's interventions to have the effect of undermining counsel's forensic plan or strategy.[23]

113 Third, it is not for the judge to create an issue where none existed.[24]

114 Fourth, the dangers of excessive intervention are most acute where they might be perceived as favourable to the prosecution case.[25] Where the prosecution case is strong, and the defence weak 'care must be taken to ensure that the defence case is put by the trial judge fairly and in neutral terms'.[26]

115 Fifth, while many of the judicial statements in this area have been concerned with excessive judicial intervention during the examination or cross-examination of witnesses, or with

19*R v Mawson* [1967] VR 205, 207–8 (Winneke CJ, Adam and Barber JJ). See also *Nwagbo v The Queen* (2021) 288 A Crim R 516, 522–23 [22] (Priest, Niall and T Forrest JJA); [2021] VSCA 93.

20*Nwagbo v The Queen* (2021) 288 A Crim R 516, 524–25 [32] (Priest, Niall and T Forrest JJA); [2021] VSCA 93.

21*Nwagbo v The Queen* (2021) 288 A Crim R 516, 525 [34] (Priest, Niall and T Forrest JJA); [2021] VSCA 93, referring to *R v Esposito* (1998) 45 NSWLR 442, 472 (Wood CJ at CL).

22*Nwagbo v The Queen* (2021) 288 A Crim R 516, 524 [30] (Priest, Niall and T Forrest JJA); [2021] VSCA 93, citing *Michel v The Queen* [2010] 1 WLR 879, 889 [34] (Lord Brown JSC).

23*Nwagbo v The Queen* (2021) 288 A Crim R 516, 524–25, [32] (Priest, Niall and T Forrest JJA); [2021] VSCA 93.

24*Brdarovski* (2006) 166 A Crim R 366, 374 [23] (Nettle JA); [2006] VSCA 231, cited with approval in *Nwagbo v The Queen* (2021) 288 A Crim R 516, 525, [33] (Priest, Niall and T Forrest JJA); [2021] VSCA 93.

25*McKell v The Queen* (2019) 264 CLR 307 (Bell, Keane, Gordon and Edelman JJ); [2019] HCA 5.

comments made by the judge during the charge to the jury, the above principles logically apply, at least with equal force, to an assessment of the permissibility of judicial interventions during counsels' addresses. If anything, judicial intervention during addresses should be approached with an even greater degree of circumspection. It is the convention in this state that addresses — whether by the prosecution or the defence — are rarely disrupted by judicial intervention, at least not in the presence of the jury. This practice reflects the fact that it is for the parties, through their advocates, to frame, explain and argue their respective cases. The parties define the issues in the trial through, amongst other things, their addresses.

116 Sixth, it is for the prosecution, not the trial judge, to identify the issues in the case it brings, and to fashion how it presents its case. The prosecution opening plays a vital role in shaping the prosecution case.

117 In *North v DPP (Cth)*[27] this Court endorsed[28] the following observations of Sulan J in *R v Haydon (No 7)*,[29] concerning the function of a prosecution opening:

> There is no fixed formula that must be followed by Crown counsel in opening a case for the prosecution.
>
> …
>
> In opening a case, Crown counsel should not embark upon argument or comment. Language likely to excite undue prejudice or emotion should be avoided. Although Crown counsel cannot be expected not to point out the strengths of the case for the Crown, the opening should be balanced and fair. If there are weaknesses in the case, then Crown counsel should not try to disguise them.
>
> The main purpose of the Crown opening is to make the case clear so that the judge, jury and defence counsel are able to comprehend the Crown case and understand the evidence as it unfolds. The opening must be fair to the accused, but that does not mean that the Crown cannot identify and highlight the strengths of its case. The jury should be given an explanation of the relevant law. It should be made clear that the final directions on the law will be given by the judge. The jury should be told that the final arbiter on the law is the judge.
>
> At the conclusion of the opening, the judge and jury should be able to understand the issues in the case and how the Crown will present its case. It is then a question whether the case has been proved.[30]

26*Kayirici v R* [2021] NSWCCA 127, [160] (Ierace J, Hoeben CJ and Harrison J agreeing). See also *McKell v The Queen* (2019) 264 CLR 307, 322 [44]; [2019] HCA 5; *R v FAV* [2019] QCA 299, [97] (Henry J).

27*North v DPP (Cth)* [2020] VSCA 1.

28*North v DPP (Cth)* [2020] VSCA 1, [65].

29[2005] SASC 21.

118 The statutory requirements have some significance here. Section 224 of the *Criminal Procedure Act 2009* (*'CPA'*) requires that the prosecutor must give an opening address to the jury on the prosecution case against the accused. The content of that opening is informed by s 182(2) of the *CPA*. That provision provides that the prosecution must outline, *inter alia*, the manner in which the prosecution will put the case against the accused (together with the acts, facts, matters and circumstances being relied on to support a finding of guilt). It is abundantly clear that it is for the prosecution to frame its opening.

119 It cannot be the function to the judge to shape or define the prosecution case, or be seen to be defining its scope. This is the role of the advocate, occupying the position of prosecutor.

(b) Judicial comment

120 A trial judge has a discretion to comment on the facts of a case. However, the discretion is not unfettered or in the nature of a 'right'; it 'is not some form of entitlement standing free of constraints imposed by the judge's duty to give the jury an accurate and fair instruction to enable them to arrive at a just determination'.[31] The discretion to comment is one that should be exercised judicially[32] and with circumspection.[33] Indeed, in *McKell*, the High Court endorsed its earlier decision in *Castle v The Queen*,[34] where the plurality observed that, unless there is a 'need' for comment, 'the wise course will often be not to do so'.[35] The Court in *McKell* summarised the position as follows:

> The point made in the observations of the plurality in each of *RPS* and *Castle* is that there is a risk that comments that are unnecessary for the performance of the duty to give fair and accurate instructions to the jury may occasion a miscarriage of justice, and so a trial judge should be astute to avoid that risk by refraining from comment that is not so required. These points are most compelling in relation to expressions of opinion by a trial judge as to the determination of disputed issues of fact.[36]

30*R v Haydon (No 7)* [2005] SASC 21, [38]–[41].

31*McKell v The Queen* (2019) 264 CLR 307, 322–323 [45] (Bell, Keane, Gordon and Edelman JJ); [2019] HCA 5.

32*McKell v The Queen* (2019) 264 CLR 307, 326 [55] (Bell, Keane, Gordon and Edelman JJ); [2019] HCA 5.

33*McKell v The Queen* (2019) 264 CLR 307, 323 [47] (Bell, Keane, Gordon and Edelman JJ); [2019] HCA 5.

34(2016) 259 CLR 449.

35*Castle v The Queen* (2016) 259 CLR 449, 470–71 [61] (Kiefel, Bell, Keane and Nettle JJ). See also *McKell v The Queen* (2019) 264 CLR 307, 323–24 [47] (Bell, Keane, Gordon and Edelman JJ); [2019] HCA 5.

121 Thus, it is clear that the threshold for permissible judicial comment is a high one; the law no longer presumes that juries welcome 'gratuitous solicitude on the part of the judiciary' in the form of comment.[37] Whether comment is or is not appropriate in a given case must be approached on the footing that the jury is the constitutional tribunal for deciding issues of fact.[38] The discretion to comment is, perhaps, best conceptualised as a purposive one: Is a comment necessary or required to ensure that the jury have a fair and accurate understanding of what they need to know to do justice in deciding issues of fact?[39]

122 In *McKell*, the vice arising from impermissible judicial comment was identified as follows:

> The issue is whether the trial judge's comments were apt to create a 'danger' or a substantial risk that the jury might actually be persuaded of the appellant's guilt by comments in favour of the prosecution case made with the authority of the judge.[40]

123 The High Court identified two considerations relevant to that assessment, which should in no way be regarded as exhaustive. They were:[41]

(a) whether the trial judge's comments may give the jury the impression that there is nothing left for them to decide on a particular issue; and

(b) whether, 'functionally', the trial judge's comments were in the nature of a second prosecution address.

(11) Analysis

(a) The interventions during the prosecutor's opening

124 Before moving on to some specific concerns with respect to his Honour's interjections during

36*McKell v The Queen* (2019) 264 CLR 307, 324 [48] (Bell, Keane, Gordon and Edelman JJ); [2019] HCA 5.

37*McKell v The Queen* (2019) 264 CLR 307, 324 [49] (Bell, Keane, Gordon and Edelman JJ); [2019] HCA 5.

38*McKell v The Queen* (2019) 264 CLR 307, 324 [49] (Bell, Keane, Gordon and Edelman JJ); [2019] HCA 5.

39*McKell v The Queen* (2019) 264 CLR 307, 326 [55] (Bell, Keane, Gordon and Edelman JJ); [2019] HCA 5.

40*McKell v The Queen* (2019) 264 CLR 307, 321–22 [42] (Bell, Keane, Gordon and Edelman JJ); [2019] HCA 5.

41*McKell v The Queen* (2019) 264 CLR 307, 322 [43] (Bell, Keane, Gordon and Edelman JJ); [2019] HCA 5.

the opening address, we make the following general observations about the opening address.

125 The opening address was delivered over three (part) days.

126 It commenced towards the end of day one and ran for about 25 pages of transcript on that day. There were very few judicial interjections on day one, and they were of an administrative nature.

127 The opening address continued for a further 83 pages over days two and three.

128 The judicial interventions increased with frequency as day two progressed.

129 This never really abated for the balance of the opening address.

130 A perusal of the transcript on days two and three indicates that there were very few pages his Honour did not interject with questions.

131 As day two progressed, the prosecutor's time in his address became increasingly focused — not upon addressing the jury — but upon addressing the judge's questions. The prosecutor's answers were invariably met with follow up questions from the judge, with then further questions and answers.

132 Of the 83 pages of the opening address across days two and three, only three pages are free from interruption.

133 The number of interventions and questions by the trial judge, during the course of the opening address by the prosecutor, exceeded 300.

134 Of course, as the applicant's senior counsel acknowledged at the hearing of this application, an assessment of whether judicial intervention has been excessive, and the effect of it upon the fairness of the trial, involves more than just a statistical analysis. Some assessment of the nature, tone and significance of the interjections must be undertaken.

135 On that point, it may also be accepted that a significant number of the trial judge's interjections were of an innocuous or administrative character. Many involved questions about the formatting of the jury book, the identification of documents, clarification of dates, and the prosecutor being asked to repeat matters which the judge had not heard.

136 Even accepting all this, the fact remains, interjections of a *substantive* nature were both numerous and persistent. It is fair to say the level of interjections, for an opening address, was extraordinary. Indeed, it is rare to see substantive interjections, in the presence of a jury, during any address, still less a prosecution opening. The approach taken by the judge — which senior counsel for the respondent accepted as being 'highly unusual' — invites close appellate scrutiny.

137 We turn now to examine the nature of the interjections.

138 In the process we have reproduced some interventions. It is somewhat artificial to characterise any of these exchanges as separate interventions. They are not. The interventions were, more or less, continuous. What we reproduce are representative examples, which the applicant highlighted on this application.

139 It seems to us that the vast bulk of the substantive interjections related to two topics.

140 The first topic related to the relevance of the rent-to-own or option-to-buy agreements, and their relationship to the contracts of sale (which were the subject of the charges).[42]

141 The second category of substantive interventions related to the relevance of the secondary loans made to the clients (borrowers) and the use of those loan monies for the purpose of making up the relevant deposits particularised under the contracts of sale (which were the subject of the charges). As we have summarised above, these secondary loans were largely made by the applicant's business, Again Investments, to the clients (borrowers).

142 We first set out some examples of when the prosecutor was seeking to address the jury about the various agreements and dealings within the context of charge 2:[43]

> HIS HONOUR: So, how does this contract — this isn't the contract you're relying on for - - -
>
> [PROSECUTION COUNSEL]: No, this is the narrative - - -
>
> HIS HONOUR: Well, perhaps you might just tell the jury how this contract fits in.
>
> [PROSECUTION COUNSEL]: It's part of the narrative leading up to the contract of sale for which a loan was applied for to the ANZ. So, this is part of the history leading up to what's occurred. Now, she will give evidence that in that contract what she was required to do was make weekly payments.
>
> HIS HONOUR: Is this one of these pay-to-own contracts we're talking about.
>
> [PROSECUTION COUNSEL]: Yes.
>
> HIS HONOUR: Is that what you mean?
>
> [PROSECUTION COUNSEL]: Yes, yes.
>
> …
>
> HIS HONOUR: I keep saying, Mr Prosecutor, it's something that the jury will have to understand what - -
>
> [PROSECUTION COUNSEL]: Yes, yes.
>
> HIS HONOUR: So, we finally get to a contract on 17/09/14 which is this one.
>
> [PROSECUTION COUNSEL]: That's right, Your Honour.
>
> HIS HONOUR: Standard contract, yes.

42The contracts of sale were often referred to by the prosecutor and the trial judge as 'the standard contracts'.

43See [(2)]–[26] above for a summary of the facts relating to this charge.

…

HIS HONOUR: Mr Prosecutor, I wonder if it just might help the jury if you set out how you say and what the relevance is of the two contracts, they're unassociated with the contract that ultimately you rely on. What's the purpose of the prosecution having those in the book?

[PROSECUTION COUNSEL]: It provides a narrative - - -

HIS HONOUR: If you could just tell the jury what it's there for.

[PROSECUTION COUNSEL]: It provides a narrative where the mother, Pavihi, was the purchaser under the contract initially, she tried to get out of that contract, had to try to get finance, she could not and then it reached the point where she approached Becker and said essentially, "I need to get finance". Becker said, "It's best if Too-A was the applicant for finance". So, it doesn't arise that Too-A was the purchaser of the contract and applied for the loan, it doesn't arise out of nothing. There's a history, a narrative to it.

HIS HONOUR: But, then following on from that, the charge is on 10 November. So, does that mean that the contract that you've taken the jury to was settled - - -

[PROSECUTION COUNSEL]: Yes.

HIS HONOUR: - - - with the loan from the bank?

[PROSECUTION COUNSEL]: Yes, I'll get to that.

HIS HONOUR: And what does that mean? Where did the money go?

[PROSECUTION COUNSEL]: It went to the vendor.

143 After further questioning about the documents and figures, the trial judge wraps up what he understood to be the gist of the prosecution evidence on charge 2:

HIS HONOUR: So, the end effect of that is someone who's at university, unemployed and not getting any income gets a loan offer of 250,000.

144 We will return later to examine the specific vice in the giving of this summary.

145 We turn now to some examples of the interventions which occurred when the prosecutor was seeking to address the jury in relation to charge 3:[44]

HIS HONOUR: Again, why do you raise that? What's the relationship between that contract and the contract that you're relying on? There's none, is there?

[PROSECUTION COUNSEL]: There is an increase in the deposit that's required.

HIS HONOUR: Yes, but they're separate contracts aren't they?

44See [(3)]–[33] above for a summary of the facts relating to this charge.

[PROSECUTION COUNSEL]: They're separate contracts, there is, but there is an increase. An increase that has to be obtained from somewhere.

HIS HONOUR: But what relevance does that have to this matter?

[PROSECUTION COUNSEL]: What it does is tell the bank there's more money that's paid into the deposit than we say there was.

HIS HONOUR: "We say that there was", what does that mean?

[PROSECUTION COUNSEL]: The amount paid for the deposit, and I'll come to that, that can be assigned to the deposit.

HIS HONOUR: So the deposit here in the contract says 65,000. And I understand you to say to the jury that that's false.

[PROSECUTION COUNSEL]: Yes.

HIS HONOUR: Do we need any more than that?

[PROSECUTION COUNSEL]: It does need to follow through to falsity in the amounts. The increase in deposit that's provided to the bank from 65,000 to 43,500.

HIS HONOUR: That's why I asked you. If you could explain to the jury what's the relationship of that? Why are they connected in any way, I don't understand and I'm sure the jury don't.

146 Shortly afterwards, his Honour summarises (what he understood to be) the prosecution case in relation to the deposit under charge 3:

HIS HONOUR: So, in some way you're saying that the contract price and the details on the earlier contract can be used in some way to show that, not only was it — the deposit wrong but it was known to Ms Becker as being wrong.

[PROSECUTION COUNSEL]: Yes.

147 The interjections with respect to charge 3 continued:

HIS HONOUR: But can you just explain to the jury how you're doing that? What you're saying to the jury, as I understand it is, two totally separate contracts have totally separate figures in relation to them. But when you get to the contract you're relying on, there's a deposit set out of 65,000, and you say not only was it never paid, but the only deposit that's ever paid by the — for anything were pursuant to the other two contracts.

[PROSECUTION COUNSEL]: No, I'm saying this, Your Honour. The deposit – the final contract has a deposit of $65,000.

HIS HONOUR: Yes.

[PROSECUTION COUNSEL]: Irakoze did not pay $65,000.

HIS HONOUR: Right.

[PROSECUTION COUNSEL]: However, she had paid originally $10,000 for a contract by way of instalments.

HIS HONOUR: Yes.

[PROSECUTION COUNSEL]: And that was around August 2014, and then Becker asked her for another $10,000.

HIS HONOUR: So you're saying that to make up the 65,000 deposit, you take into account what she'd earlier paid under totally separate contracts of 20,000?

[PROSECUTION COUNSEL]: If you were to take that into account.

HIS HONOUR: If you were.

[PROSECUTION COUNSEL]: If you were to take that into account, it still does not reach the $65,000. It is far, far less.

HIS HONOUR: And what, it's suggested to the jury that there was an agreement between her and Becker that the earlier deposits paid would make up this deposit of 65,000? Is that what the prosecution is saying?

[PROSECUTION COUNSEL]: No, Your Honour. What it's saying, if that's how it was worked out, that's how it's claimed to be work out, it's less.

HIS HONOUR: Well if you're not saying it, why raise it?

[PROSECUTION COUNSEL]: Because if there were moneys paid towards the purchase of the property.

HIS HONOUR: Righto. No doubt someone on the jury will understand that.

148 A little later, the trial judge again seeks to recapitulate (his understanding of) the prosecution case on a particular point:

HIS HONOUR: So what's this document doing, how do we tie that in with what the Crown is putting? Because the contract was signed the same day to purchase the property with a deposit of $65,000, and the same day as the contract was signed with a deposit of $65,000 there's a mortgage to Again Investments. What's all - - -

[PROSECUTION COUNSEL]: Well, we say that it indicates no deposit was paid by Irakoze for the purchase - - -

HIS HONOUR: And more than that, not only was no deposit paid, but she enters into a mortgage for $65,000 to Again Investments.

[PROSECUTION COUNSEL]: Yes.

HIS HONOUR: And what does the Crown say the purpose of that was?

[PROSECUTION COUNSEL]: Why the Crown is using it, Your Honour, is to say Irakoze did not have the money - - -

HIS HONOUR: No one had the money; it was never paid.

[PROSECUTION COUNSEL]: That's right.

149 The questioning with respect to charge 4[45] was in a similar vein. The trial judge punctuated the exchanges with his own reflections as to the import of the prosecution case:

HIS HONOUR: And what does that relate to, an earlier contract?

[PROSECUTION COUNSEL]: It appears so, Your Honour, but what it relates to is how much deposit was paid, what maximum deposit was paid at that time.

HIS HONOUR: Well what that receipt shows that on 16/07, in regard to some other contract, not the one you're relying on, 5/11, a deposit was paid of $15,000.

[PROSECUTION COUNSEL]: That's what the receipt shows.

HIS HONOUR: And received from Ms Iva. So what relationship does that have to the contract you're relying on?

…

[PROSECUTION COUNSEL]: Under tab 4.2, p 2169. There's a deposit receipt dated 6 November 2014 purportedly for $50,000 paid by Iva for 114 Hilton Way, Melton West. That was never paid by Iva and, ultimately, that deposit receipt never made its way onto the bank file. The receipt was false. And at that stage, in terms of - - -

HIS HONOUR: Not only was it never paid, but it was never sent to the bank.

…

HIS HONOUR: So, what's the end result of that, that what he's paid in cash as a deposit in the other contract plus instalments and used as this deposit providing the sale goes through otherwise it's refundable.

…

[PROSECUTION COUNSEL]: …Becker went to his house, where Iva signed a loan agreement with Again Investments, and that loan agreement, pardon me, is under tab 4.2, p2224. At p2228 it's dated 27 November.

HIS HONOUR: What date did you say?

[PROSECUTION COUNSEL]: It's the first page.

HIS HONOUR: 27 November?

45See [(4)]–[44] above for a summary of the facts relating to this charge.

[PROSECUTION COUNSEL]: And the last page it's dated 27 November 2014. The amount - - -

HIS HONOUR: And the matter settles on 6 December.

[PROSECUTION COUNSEL]: Yes. The amount of the loan is $43,110.65, to be repaid by monthly instalment. The purpose of it is said to be advanced — the purpose, the mortgage advance will be supplied to facilitate the purchase of the property.

HIS HONOUR: So the agreement for the loan signed five or six days prior to, is 43,110, and the deposit paid was 40,500.

[PROSECUTION COUNSEL]: Now what's said about that is Iva did not pay the deposit. Did not have the money to pay the deposit. The loan offer was made to Iva on 2 December 2014, that's - - -

HIS HONOUR: Sorry, what was that? The offer?

[PROSECUTION COUNSEL]: Sorry, the loan offer to Iva was 14 November 2014. It's p2077. He signed an acceptance for it on 16 November 2014, that's at p2083.

HIS HONOUR: Well that means the offer of the loan came on 14 November and the mortgage had been — was taken out about two weeks later because they didn't have enough money to settle it.

[PROSECUTION COUNSEL]: He didn't have enough money, the prosecution say, to pay the deposit. So no deposit of $40,500 was paid, that's the falsity. So although they got the deposit and false payslip, and we say the ANZ would not have given the loan if it was aware that any false information was given to it for the loan application.

150 What we have reproduced above is representative of the style and intensity of judicial questioning which occurred over days two and three, and in relation to each charge.

151 As many of the questions suggest, the trial judge was concerned to ensure that the jury understood the evidence and the issues. The case was factually complex and document heavy. There were multiple separate particulars to each charge. The defence case was multi-layered. It was not an easy case to preside over.

152 Many of these questions may have been individually unobjectionable, as occasional questions. It is clear, though, that this went well beyond intermittently inviting the prosecutor to simply identify the relevance of a document.

153 Unfortunately, the sheer volume and persistence of the questions — in the presence of the jury — risked the creation of a perception that the judge had adopted the role of marshalling the prosecution case.

154 That is so, even if the judge was well motivated to assist the jury.

155 The judge's questions extended to pressing — almost cross-examining — the prosecutor for clarifications about how they were putting their case.

156 By its nature, questioning of that kind had a tendency to encourage greater forensic precision, as well as possible enlargement of the prosecution case.

157 Recently, Doyle JA in *Roberts v The Queen*[46] recognised the care that must be taken when judges attempt 'to clarify the relevance of evidence' in front of the jury (during witness testimony). Such attempts 'may, if not expressed carefully, transgress into statements that might be seen to be supporting the contended import of the evidence rather than querying or clarifying its contended relevance'.[47] Certainly, 'any lengthy, or potentially controversial, debate about the relevance of evidence should ordinarily take place in the absence of the jury'.[48] Self-evidently, this approach was not followed here.

158 The judge also engaged in recapitulating or summarising his own understanding or interpretation of the prosecution case.

159 This involved emphasising aspects of the prosecution case, to the advantage of the prosecution. The mere fact that a summing-up of a party's case demonstrates the strength of the case could not be a basis for complaint if it occurred during a charge, within the context of an otherwise fair and balanced charge.[49] But these summaries happened during the prosecutor's opening. This was an advantage to which the prosecution was not entitled.

160 Additionally, succinct recapitulations of the evidence by the judge carried a risk that the jury may have understood that the judge endorsed the 'import of the evidence' contended by the prosecution.

161 A number of the passages, reproduced above, illustrate the degree to which the judge sought to condense and encapsulate the effect of the evidence (or his understanding of it). To take a few examples:

(a) 'not only was it — the deposit wrong but it was known to Becker as being wrong'.[50]

(b) 'more than that, not only was no deposit paid, but she enters into a mortgage for $65,000 to Again Investments'.

(c) 'no one had the money; it was never paid'.[51]

162 By way of an additional example, when the prosecutor was dealing with charge 6,[52] his Honour sought to summarise his understanding as to how the loans made by the applicant's

46*Roberts v The Queen* (2022) 141 SASR 73, 95 [99] (Doyle JA); [2022] SASCA 36.

47*Roberts v The Queen* (2022) 141 SASR 73, 95 [99] (Doyle JA); [2022] SASCA 36.

48*Roberts v The Queen* (2022) 141 SASR 73, 94 [97] (Doyle JA); [2022] SASCA 36.

49*Roberts v The Queen* (2022) 141 SASR 73, 132 [270] (Doyle JA); [2022] SASCA 36.

50Extracted from the intervention reproduced above at [151].

Extracted from the intervention reproduced above at [153].

51Extracted from the intervention reproduced above at [153].

company, Again Investments, 'tied' into the deposits made under the contracts of sale (which were the subject of the charges):

> HIS HONOUR: Can I just take up the issue of the loan? So what happens, it seems that the agent, having three months earlier entered into this rent to own contract, or arranged — not even three months earlier, two months earlier — then does the loan agreement in November, to pay the mortgage advance, which must be part of, I assume, the 49,500, and that's done on the position that that mortgage will be paid pursuant to the loan agreement and interest, after settlement, of 12 per cent per annum interest by weekly payments. So that's how the loan ties in. So in other words, the loan provides the purchaser with a deposit which they didn't have.

163 These dangers crystalised with the judge's summation concerning charge 2, 'so, the end effect of that is someone who's at university, unemployed and not getting any income gets a loan offer of 250,000'.[53] The prosecutor replied 'That's right, your Honour'.

164 The judge's emphasis of the collective force of several features of the evidence — and its structural tone — hinted at his scepticism about the legitimacy of this loan, and scepticism that someone in the applicant's position might hold a belief that it was legitimate.

165 These were in fact the arguments mounted by the prosecution in its final address. The prosecution ultimately went to the jury on the basis that the applicant was aware of Leiataua's circumstances, and that these circumstances must have indicated to the applicant that Leiataua had no capacity to pay the deposit, or service the loan, and that something was patently amiss.

166 This particular intervention or summary was conversely damaging to the defence case given that the applicant's state of mind was very much in issue. While it is common ground that the payslip for Too-A Leiataua[54] relied upon in the contract of sale for charge 2 (purportedly from Strandbags Group) was false, the applicant's defence — as it transpired — was that Leiataua did have a source of income. It was ultimately argued by the applicant's trial counsel that, in the circumstances, the jury could not be satisfied that the applicant was aware Leiataua had no source of income.

167 The prosecutor often agreed with the trial judge's encapsulations or summaries. The impugned passage in relation to charge 2 illustrates this. This throws up another vice — the appearance of alignment in thinking between prosecutor and judge.

168 There are many reasons why a prosecutor's opening is not the occasion on which to conduct such free ranging discussions, not least of which is that things may be raised which the jury should not hear.

169 This risk also materialised in this case, as is revealed by the following exchange in relation to the legality of the rent-to-own contracts within the context of the prosecutor dealing with

52 See [(5)]–[59] above for a summary of the facts relating to this charge.

53 This has been reproduced above at [148].

54 Also known as Too-A Buckland.

charge 7:[55]

> HIS HONOUR: So this document, if you look at p1619, whatever it's called, according to the terms and conditions, it's an option to purchase. The amount payable by the buyer to the seller for the buyer to acquire that option to purchase is $33,548.
>
> [PROSECUTION COUNSEL]: Yes.
>
> HIS HONOUR: So, what's being sold there is an option to purchase, is that right?
>
> [PROSECUTION COUNSEL]: Although, whatever it's described as, at the top of the document you've got Victorian standard rent to own.
>
> HIS HONOUR: Well, it might be.
>
> [PROSECUTION COUNSEL]: Yes.
>
> HIS HONOUR: Anyway, we're not interested in the legality of it, but - - -
>
> [PROSECUTION COUNSEL]: No.
>
> HIS HONOUR: - - - it certainly doesn't look like a sale of a contract or a terms of contract to me, it sounds like an option to buy.
>
> [PROSECUTION COUNSEL]: Yes.
>
> HIS HONOUR: You will recall that you said to the jurors in opening that these matters are approved by statute. Whether they were or not probably is a question, but it's not a matter for the jury to worry about.
>
> [PROSECUTION COUNSEL]: No, I didn't say they were approved by statute.
>
> HIS HONOUR: Sorry. You – what did you say?
>
> [PROSECUTION COUNSEL]: They – terms, contracts are defined by legislation. It involved - - -

170 As we have summarised above, the 'rent-to-own' or 'option-to-buy' style contracts were a central part of the applicant's business model.

171 While the prosecution introduced this evidence to provide context, the applicant's defence was partly tethered to these agreements. The applicant relied upon payments under these 'rent-to-own' or 'option-to-buy' contracts as being credited towards the making up of the deposits for the contracts of sale subject to the charges. At the very least, this formed part of the applicant's defence that she may have believed that such payments contributed to the making up of the deposits.

172 This interjection at least raised the prospect that the applicant's business model may have involved illegal conduct, by signalling the possible illegality of the 'rent-to-own' or 'option-

55See [(6)]–[67] above for a summary of the facts relating to this charge.

to-buy' arrangements. The interjection had the capacity to engender prejudice against the applicant and to diminish the credibility of her defence.

173 It is an example of a trial judge raising an issue in the presence of the jury which had not been (and was not going to be) raised by the parties. We note that shortly before the interjection, there was an earlier discussion between the trial judge and counsel (in the absence of the jury) where the judge raised an issue as to the legality (or illegality) of these 'rent-to-own' or 'option-to-buy' style contracts. At that stage, the prosecutor made plain that he would not be suggesting that the 'rent-to-own' or 'option-to-buy' contracts were illegal. As it happened, the prosecution never suggested illegality during the trial.

174 Questioning the legality of the business model (and the rent-to-own contracts) did not directly support the prosecution case. As we have said, it was no part of the prosecution case that these agreements were illegal or illegitimate. That issue was never litigated in this trial. Even so, for the reasons we have given, these comments had the potential to be harmful to the defence case.

175 The interjection also came on the back of the judge having already questioned the relevance of these 'rent-to-own' or 'option-to-buy' style agreements to the jury's consideration of the charges. A number of the judge's questions asked of the prosecutor (some of which we have reproduced above) were embedded with comments that these agreements were 'unassociated' with the relevant contract of sale; they were 'totally separate' contracts involving 'totally separate' figures. His Honour at one point questioned the relevance of any monies paid under these earlier agreements to the contracts of sale which were the subject of the charges. Such interventions tended to marginalise the significance of these earlier agreements. In doing so, they diminished the plausibility or viability of the applicant's defence.

176 In summary, we make the following observations about the excessive interventions which occurred here.

177 While there is no fixed formula that must be followed by a prosecutor in opening a case, it is for the prosecutor — not the judge — to identify the issues in the case it brings, and to fashion how it presents its case.

178 This will include outlining the manner in which the prosecution will put the case against the accused. As we have said above, the main purpose of the prosecution opening is to 'make the case clear so that the judge, jury and defence counsel are able to comprehend the Crown case and understand the evidence as it unfolds'.[56]

179 The prosecutor's address will be informed by the evidential and legal landscape, legitimate forensic judgements, and by prosecutorial obligations.

180 What is clear is that under the adversarial system, it falls to the prosecutor to shape and deliver the opening address, unguided by the judge. The judge plays no role in shaping the prosecution case save for procedural or evidentiary rulings.

181 In this case, the judge trespassed over these boundaries.

182 The number and nature of the interjections saw the prosecutor's opening to the jury turn 'into something more akin to a workshop exercise', to adopt the submission of the applicant.

183 Certainly, the transcript reads more like a 'legal discussion', between counsel and the bench

56 *R v Haydon (No 7)* [2005] SASC 21, [38]–[41] (Sulan J).

concerning the relevance of documents and issues, than an opening address.

184 At best, the judicial interventions during this opening address, viewed overall, tended to clarify, emphasise and corral the prosecution case. They at least risked giving the appearance that the judge had an interest in pulling the prosecution case into a more presentable shape. This, in turn, risked creating the impression of judicial alignment with the prosecution case.

185 It was not for the judge to address the imprecision in the prosecution case, to make the prosecution case more comprehensible, or to 'tie' the evidence together for the jury, and certainly not in front of the jury.

186 At worst, the interventions risked conveying to the jury the impression that the judge experienced some scepticism about the legitimacy of the applicant's business model, and about the plausibility of someone in the applicant's position believing in its propriety. This would have potentially impacted the jury's consideration of the defence on all the charges.

187 In short, the nature and persistence of the questioning tended to convert what the law requires to be an adversarial process into an inquisitorial one.

188 The respondent makes the point that the judge's frustration during the prosecutor's opening address is likely to have rebounded more unfavourably upon the prosecution case than upon the applicant or her defence.

189 The judge did convey to the jury his dissatisfaction about the manner of the presentation of the prosecution case. He recognised as much in his charge to the jury, saying, 'I might not have been happy by the way the prosecution was presenting its case … It is really to do with me trying to make sure that this case runs as efficiently as possible, especially in your interest'.

190 We do not, however, think this argument is an answer to the concerns which we have identified.

191 Our concern is that an impression may have been created that the judge considered that his intervention was required *because of* (what he perceived to be) the unsatisfactory management of the prosecution case. That is, it may have appeared to the jury that the judge considered it necessary to assume the role of prosecutor to fix the presentation of the prosecution case.

192 We have also given consideration to the respondent's argument that a large portion of the judicial interjections did not relate to seriously contested issues in the trial.

193 It may be accepted that a number of the interjections sought clarity around uncontroversial facts and objective circumstances, such as figures, arithmetic, dates, and the identification and particularisation of the different agreements and arrangements.

194 The evidence ultimately introduced (and not challenged) also substantially corresponded with the evidential matters canvassed with the prosecutor by the judge.

195 But none of this is a sufficient answer to the concern that the judge may have given the appearance that he had aligned himself with the prosecution case. As we have said above, some of the interjections did raise issues of potential controversy. The respondent's argument also fails to address the risk that the totality of interjections (including their sheer frequency, persistence and intensity) may have created the impression of prosecutorial alignment.

196 For the reasons we have outlined, we think that the nature, manner and frequency of the judicial interventions which occurred during the prosecutor's opening address constituted a material irregularity in the trial.

197 Before considering whether a substantial miscarriage of justice has occurred, we turn to consider the interventions and comments which occurred after the opening addresses.

(b) Mid-trial interventions

198 At the oral hearing before us it became apparent that the applicant's case was largely confined to the judicial interventions (or comments) which occurred at the bookends of this trial — during the prosecutor's opening and during the trial judge's charge.

199 There were, however, two interventions during the running of the trial which the applicant still highlighted.[57]

200 During the cross-examination of the witness Ropati Iva (who secured the home loan falling under charge 4), the applicant's trial counsel was in the process of questioning the witness about a 'tenant option agreement' when the trial judge intervened. The following exchange occurred:

> HIS HONOUR: And what are you describing it as? An option? A tenant option agreement.
>
> [DEFENCE COUNSEL]: Yes.
>
> HIS HONOUR: What's that mean?
>
> [DEFENCE COUNSEL]: I'll come to it, Your Honour.
>
> HIS HONOUR: Well, just tell me. What does it mean?
>
> [DEFENCE COUNSEL]: That's an option.
>
> HIS HONOUR: What's an option agreement? Never heard of it.
>
> [DEFENCE COUNSEL]: What it means is that this tenant, Mr Iva, has the option to purchase the property at the exercise price before the expiry date. That's paragraph 1, 2096.
>
> HIS HONOUR: So, Again Investments who are not the vendor — not the owner, are giving an option to someone to buy a property that they don't own.
>
> [DEFENCE COUNSEL]: Which they have earned an agreement with the vendor to exercise an option over at a particular price.
>
> HIS HONOUR: Yes, but that's with the vendor?

57 In support of her overarching contention that this trial miscarried because impermissible judicial intervention occurred, the applicant initially identified, in her written case, several interventions during the running of the trial. This focus narrowed at the hearing of the application.

[DEFENCE COUNSEL]: That's right so they're back to - - -

HIS HONOUR: Well why do they have to give an option?

[DEFENCE COUNSEL]: Beg your pardon?

HIS HONOUR: Why do they've got to give an option?

[DEFENCE COUNSEL]: Because they're — they've got an agreement with the vendor which involves them assuming rights and obligations in relation to the property. There's an option — and there's an option - - -

HIS HONOUR: Yes but there's no transfer that — in that agreement there's no transfer of the property therefor they've got no right to be offering an option.

[DEFENCE COUNSEL]: Well, respectfully Your Honour, that's a matter of law and I - - -

HIS HONOUR: How do you offer an option on a property if you haven't — if there's no transfer of the property?

[DEFENCE COUNSEL]: Your Honour as a matter of law this is, in my respectful submission, permissible. Her company had an option - - -

HIS HONOUR: Well, we'll argue that later, but at any rate, I'm just trying to understand what it is you say it's a tenant option agreement.

201 In the absence of the jury, the applicant's trial counsel took objection to what the judge had said. We set out that exchange below:

[DEFENCE COUNSEL]: For Your Honour to raise that in — it's one thing for Your Honour to raise it with me in the absence of the jury and I understand, parts of this case, Your Honour has shown a degree of scepticism, if I can be so frank, and I've no issue with Your Honour raising that with me in the absence of the jury, but for that to be done in front of the jury, in my submission, is highly prejudicial.

HIS HONOUR: Not at all.

[DEFENCE COUNSEL]: We haven't even made submissions about the law. I wasn't on notice - - -

202 The trial judge seemed to have accepted the merits of the exception, because he gave the following remedial direction:

HIS HONOUR: Ultimately, as you know, the fundamental issues in this case for you to determine beyond reasonable doubt is whether the prosecution prove that Ms Becker was involved in the deceptions — alleged deceptions — against the bank, all right?

So the discussion between me and [defence counsel] as to what can a tenant option agreement and what it cannot do in law is really not relevant, and nor is it something — we've got enough to do in our case, and nor can I tell

you will we be going into the matter as a matter of law in front of you, okay? So that discussion, and certainly, as I said yesterday, none of those matters should be taken as anyway prejudicial to Ms Becker. Yes, [defence counsel].

203 The applicant complains that the judge's intervention, in the presence of the jury, again directly raised the spectre of illegality concerning the applicant's business model. It was a significant matter, and highly prejudicial. This occurs, the applicant emphasises, after the tone had been set from the interventions which occurred during the prosecutor's opening.

204 This remedial direction could not, the applicant contends, fully address this prejudice, which was extremely high. The damage, by now, had been done, so to speak.

205 The respondent submits that the exchange in the presence of the jury is ambiguous. If it did suggest further illegal or improper conduct by the applicant, such an interpretation and any resulting prejudice to the applicant was adequately cured by his Honour's directions.

206 In our view, the respondent's arguments would have had greater force had this been an isolated interjection. As the applicant points out, it was not.

207 It is the second time the trial judge had questioned the legality of these style of agreements (the first having occurred during the prosecutor's opening which we have discussed above). These agreements were an important plank in the defence case. This was not a peripheral issue.

208 The interjection also came against the background of the excessive judicial interventions which occurred during the prosecutor's opening (discussed above).

209 Within the wider context of what occurred in this trial, we accept the submissions of the applicant that this intervention was prejudicial and could not be completely neutralised by the remedial direction. While not decisive, this interjection added weight to the contention that impermissible judicial intervention occurred in this trial.

210 The applicant also underlines an intervention which occurred during the final address of her trial counsel.

211 This intervention occurred in the presence of the jury.

212 At the time of the intervention, the applicant's trial counsel was addressing the jury in relation to the applicant's *state of mind* on the deposit issue. The following occurred:

> [DEFENCE COUNSEL]: In relation to the deposits particular, whether she knew that that representation and the contract of sale was false, or probably false, depends — at least in part — on what you make of the loan agreements from Again Investments and whether Ms Becker believed that any part of the loan agreement could be used to make up the deposit. Now, before I get to those loan agreements I just want to recap on the - - -
>
> HIS HONOUR: I think what you've just said to the jury is simply not possible and I'll be telling the jury. The loan agreements in this matter can't be used to make up the deposit, okay?

213 After a brief discussion, the applicant's counsel asked to raise a matter in the absence of the jury. The jury left.

214 The applicant's trial counsel then emphasised to the trial judge that his submission to the jury was directed solely at the applicant's state of mind as it related to the use of these secondary loan monies to make up the deposits. He emphasised that he was not seeking to traverse the trial judge's ruling that they could not (in law or in fact) have contributed to the deposits.

215 It is difficult to gauge, from the transcript of the discussion, the trial judge's attitude to counsel's explanation, although the judge maintained he would be directing the jury that the secondary loan monies could not (in law or in fact) contribute towards the deposits.

216 When the applicant's trial counsel resumed his final address, he made it plain to the jury that his submissions were solely focussed upon what the applicant may have believed, accepting that (in law or in fact) the loan monies from the applicant's company could not contribute to the deposits.

217 At the application before us, the applicant accepts this interjection is likely to have been prompted by a misunderstanding about the submission being made. We agree:

(a) During the interjection itself, the judge immediately clarified what he meant by the expression, 'I think what you've just said to the jury is simply not possible'. by saying, 'the loan agreements in this matter can't be used to make up the deposit, okay?'

(b) Also during this interjection, the judge said, 'I'll be telling the jury that'. In his charge the judge told the jury that 'the loan agreements in this matter can't be used to make up the deposit'.[58]

(c) Defence counsel successfully clarified the position to the jury.

218 Once it is accepted that the interjection was the product of a misunderstanding, what the judge literally or technically said in the presence of the jury was consistent with his ruling, and ultimately his charge to the jury (i.e. that the secondary loans could not be used to make up the deposits).

219 The real concern, according to the applicant, is the adverse impressionistic impact that such an interjection would have had upon the jury, given that it occurred as part of a pattern of interventions which raised questions about the legality of the applicant's business model.

220 The respondent also submits that the impugned intervention is the result of a misunderstanding by the learned trial judge and that this would have been apparent to the jury. The respondent observes that no direction was sought by counsel from the trial judge. The intervention was not, the respondent contends, a matter of great moment in the trial.

221 Again, we think there would have been greater force to the respondent's arguments had this intervention occurred in isolation; it would have been more easily dismissed as an apparent misunderstanding, rectified soon afterwards.

222 There is something to the applicant's contention that, given its timing, manner and context, the interjection contributed to the *impression* that the judge harboured some cynicism about the defence case. The reasons for this are:

58 No complaint was made at the trial, and no complaint is made on this application, about this aspect of the charge.

(a) This interjection was not one off. It occurred as part of the judge's ongoing pre-occupation with the legality of the applicant's business model more broadly. It was the third occasion on which the judge — in the presence of the jury — questioned the legality of aspects of the applicant's business model.

(b) The interjection was sharp. It implied criticism of counsel. It plainly disrupted the flow of counsel's forensic arguments. It carried a risk of reflecting poorly upon counsel — and thus upon the applicant — in the eyes of the jury.

(c) The interjection must also be assessed within the context of what was to follow in the judge's charge. As will become apparent shortly, we think the judge's charge conveyed at least an appearance of judicial scepticism in relation to the applicant's defence that she may have believed that the secondary loans could contribute to the making up of the deposits. This was the very defence which the applicant's counsel was addressing when this intervention occurred.

223 In short, like the intervention during the cross-examination of the witness, this intervention is not determinative of this ground of appeal. It does, however, add something to the strength of the argument that the judge engaged in a pattern of interjections and commentary in the conduct of this trial which went beyond the scope of what is permissible.

224 It is certainly unfortunate that the judge interrupted counsel's address, in the presence of the jury. Had he raised this issue during a break, and in the absence of the jury, the apparent misunderstanding would have been resolved, and the jury would not have been exposed to it.

(c) The judge's charge

225 There appeared to have been two legs to the applicant's complaint about the charge, one quantitative and the other qualitative.

226 The first leg is that there was an imbalance in the time dedicated to summarising the prosecution case by comparison with the time given to the summaries of the defence case.

227 For contextual purposes, it is necessary to say something about the structure of the charge.

228 The trial judge first summarised the various fundamental criminal trial principles. This was followed by a summary of the elements and the principles of liability (including complicity). Through his exposition of these matters, the judge made frequent reference to the prosecution case and the evidence relied upon it.

229 Before turning to a summary of the parties' arguments, the trial judge informed the jury that 'necessarily because I have spent some significant time on how the prosecution puts its case in explaining the elements to you and the manner in which the case is put by the prosecution, I will spend a longer time on [defence counsel's] address to you'.

230 This is in fact what occurred. The trial judge then dedicated approximately five pages of transcript to summarising the prosecution address (and arguments) followed by fifteen pages in relation to the defence address (and arguments).

231 As we have said, the judge was required to charge the jury on the elements and issues in the trial by reference to the evidence. All the evidence in this trial was adduced as part of the prosecution case. That being the case, 'it was inherent in the nature of the case that the summing-up would consist largely of a summary and synthesis of the prosecution evidence

and case'.[59]

232 The first leg, when considered by itself, has no real merit. Save for the issues raised by the second limb of this complaint, we would have been untroubled by the complaint that the charge lacked balance.

233 Indeed, during the hearing of this application, it became apparent that the central plank in the applicant's attack upon the trial judge's charge really centred on the second leg.

234 Turning to the second leg, the impugned passages — which are said to have rendered the charge unbalanced and unfair — emerge in the latter half of the judge's summary of the defence address (and arguments).

235 The applicant contends that a 'pattern' developed when the judge was summarising the defence case. This pattern involved, according to the applicant, the judge following up important defence arguments with 'the prosecution's rebuttal'; this undercut the applicant's case, to the point where the charge was neither balanced nor fair. We take this to be a complaint that by advancing the prosecution's rebuttal the judge effectively donned the mantle of the prosecution.[60]

236 The applicant contends this unfairness, and lack of balance, provoked the making of an application to discharge the jury, which was unsuccessful.

237 In particular, the applicant focussed upon the trial judge's summary of the applicant's defence case concerning her state of mind in relation to the use of the secondary loans to make up the deposits. As we have explained above, this went to her knowledge concerning the falsity of the representations that the deposits had been made.

238 The judge said the following (with emphasis placed upon the so called 'prosecution's rebuttal'):

> [Defence counsel] submitted that you would have to take into account whether in fact, *even though she is an estate agent and has such experience*, that she could have believed that it was possible for her to loan the deposit, that in those circumstances, even though she entered into a written agreement, that despite the fact that it cannot be taken because of the determination by myself to make up the deposit, these are different questions.
>
> You have got a question, what was in her mind? Did she know the representation was false? Did she intend the financial advantage to be obtained as a result of that representation? Did she, Ms Becker, obtain it dishonestly? Did she in fact think, *despite the patent falsity of the amount in the contract*, that taking the totality of the rent-to-own matters and the fact that she was going to arrange to give finance to settle these matters, if you take all that into account, was she acting dishonestly? Well that is a matter for you, members of the jury. As I say, *you have got to look at all the surrounding circumstances in regard to that, in particular her experience and knowledge,* the fact that she

59*Roberts v The Queen* (2022) 141 SASR 73, 95 [99] (Doyle JA); [2022] SASCA 36.

60*McKell v The Queen* (2019) 264 CLR 307, 319–20 [35] (Bell, Keane, Gordon and Edelman JJ); [2019] HCA 5.

was involved financially herself in these contracts, it is a matter for you.

239 As the applicant submitted in this hearing, the point— *even though she is an estate agent and has such experience* — was never used or employed by the applicant's trial counsel. Rather, it was the prosecutor who seized upon the applicant's *experience as an estate agent.* The prosecution did so in order to meet the defence hypothesis that the applicant may have believed that the deposits had been paid.

240 This is evidenced by the extent to which it featured in the prosecution's closing address. In anticipation of the applicant's defence, the prosecution commenced its closing address by identifying the applicant's 'qualifications and knowledge in the area that she operated' as '[p]art of [the] context … from which you should assess [the applicant's] conduct'.

241 The trial prosecutor expanded on this statement, arguing that:

> [The applicant's background] informs us of what we can infer was her understanding and intent in relation to these bank loans. The accused was a real estate agent. She also held a credit licence. The licence authorises her to provide credit, suggest or assist in credit contracts.
>
> What I suggest you may infer from that is she would have had a good knowledge and understanding of real estate transactions and how they worked. That means she had skill and knowledge and knowhow in contracts for renting and purchasing properties, deposits for the purchase of properties, how loans are obtained and the considerations that lenders may take into account in borrowing monies.[61]

242 Seen in this light, the trial judge's summary of this point was not — as it purported to be — a summary of the defence case at all.

243 Given the context in which these references were placed within the charge, they tended to endorse the prosecution's case in rebuttal to the defence hypothesis — namely, that the applicant's knowledge, experience and position as a real estate agent rendered implausible the defence hypothesis that she may have believed the deposits had been paid.

244 The rhetorical question compounded the danger that the judge was of the opinion that the defence as to the applicant's state of mind was objectively unlikely, in the light of *the patent falsity of the amount in the contract* and given *her experience and knowledge*.

245 In our view, the comments were 'apt to add to the force of the case for the prosecution'.[62] They gave rise to a real risk that the jury 'might reasonably have understood the judge to have

61 After referring to the clients' (borrowers') limited financial literacy, lower economic status and, in some cases, their limited understanding of the English language, the trial prosecutor went onto to submit that they substantially did what they were told without fully understanding what they were doing.

62 *McKell v The Queen* (2019) 264 CLR 307; [2019] HCA 5.

conveyed his opinion'[63] or 'personal view'[64] that the applicant's defence as to her state of mind was implausible.

246 This was very damaging given the centrality of this hypothesis to the defence case.

247 We set out below some further passages from the charge upon which the applicant also places reliance in support of her argument that the charge lacked fairness and balance (again with emphasis placed upon the so called 'prosecution's rebuttal').

248 In relation to the applicant's case concerning charge 2 (the loan involving the borrower Too-A Leiataua), the trial judge said:

> The second matter [defence counsel] questioned is, was the representation made by Becker? I must say, I had difficulty understanding what that meant, because Becker was the person that prepared the contract, but that is what [defence counsel] put to you.
>
> And the third matter was, was the representation false? That is, looking at the contract as detailed, was it false? His argument was did the representation that the prosecution has put, that is in their information, the contract of real estate, take two for example, which is Too-A, the particulars are the contract of sale of real estate for the property signed that represented the deposit of $63,000 was paid by Too-A Leiataua. *It is a matter for you whether it was false, but clearly it was never paid by Too-A Leiataua and that is a matter for you and that is the question that was put to you*.

249 And later:

> It is important obviously to analyse the particular contracts when you are doing this, obviously, Too-A in Contract 2 had nothing to do with any rent-to-own contact [sic], that was one of her parents. Whatever was paid in regard to the rent-to-own there had nothing to do with her, but anyway, that is a matter really for you to look at.
>
> [Defence counsel] asked you to take into account the business model and the fact even though he told you he is not putting the mortgages offered, the five mortgages offered in this case to you, on the basis that they can make up the deposit, he asked you in those circumstances where she was offering this money post the contract, did she have the necessary state of mind to satisfy these elements. Well that is a matter for you. *But even though the loans were offered, the fact was those moneys were never paid until close to settlement. You have got to take into account when the contract was executed, what it had to say and you have to take into account when that contract was executed, what was her state of mind, but that is totally a matter for you.*

250 The applicant accepted it was not always clear whether these comments represented the prosecution's arguments or comments by the judge. Either way, they objectively tended to diminish the defence case (including her state of mind defence).

63 *Ankur v DPP* [2021] VSCA 110, [68].

64 *R v FAV* [2019] QCA 299, [97] (Henry J).

251 In relation to the applicant's defence case concerning causation the trial judge said:

> Coming then to Element 2(d), that is the accused obtained the financial advantage for the borrower as a result of making the false representation. It is essentially a question of causation. [Defence counsel] analysed a number of circumstances and evidence given by the bank witnesses and what was shown on the various screens. It is clear that – sorry, I should not say that. You have to make the conclusion obviously, but as a result of that analysis, you might come to the conclusion that the granting and the initial assessment done by the computer as to the loan clearly did not take into account the deposit because Anand said really, it did not matter. You did the LVR and once you got to that, you did not need the deposit. *But of course, that is not the falsity that the prosecution is relying upon. The prosecution is relying on the inference, not as to how you got the amount by going through the various — through the computer process, but by the fact that when the contract was received by the bank, which it had to be before the loan offer went out, that that loan. The reliance of the prosecution is not so much on the process, although they spent a lot of time on the process, in the end, the reliance is on the conclusion. The prosecution is relying on the inference, not as to how you got the amount by going through the various – through the computer process, but by the fact that when the contract was received by the bank, which it had to be before the loan offer went out, that that loan offer, on the evidence of Anand and Carswell, would not have been made had the bank been aware either that the deposit was not paid, as the contract suggested or secondly that it was not paid by the purchaser, that is what the prosecution is relying upon.*

252 The judge may well have been right about this. But, as with all the prosecution arguments, by the time the judge reached the point of summarising the defence case, he had already thoroughly summarised these prosecution arguments.

253 Earlier in the charge, nearly four pages were occupied with the judge's summary of evidence relating to the ANZ bank and computer approval procedures, and to the prosecution's reliance upon it. This included what the trial judge said in the impugned passage.

254 The jury was already well armed with the prosecution's arguments; repetition or elaboration of them was neither required nor justified.

255 To be clear, this was not a case where the defence arguments raised matters which required a correction from the trial judge to 'restore the balance'[65] or to otherwise ensure that the jury decided the case on its merits.

256 We reject the respondent's argument that the references to the prosecution arguments when dealing with the defence case did no more than focus the jury's attention on the real issues in dispute.

257 Certainly, this was no mere recital of the prosecution's case or submissions.

258 This was one of those cases where the judge had to be especially careful about 'holding an even balance'[66] between the cases of the prosecution and the applicant. We say that for two reasons.

65 *McKell v The Queen* (2019) 264 CLR 307, 320 [38] (Bell, Keane, Gordon and Edelman JJ); [2019] HCA 5.

259 First, there was an apparent risk of prejudice which pervaded the atmosphere of this trial. During the running of the trial, the trial judge said to the applicant's trial counsel (in the absence of the jury), 'I wouldn't think it would be unreal for the jury to take a pretty disparaging view about your client's activities, that is, trawling at the bottom of the market to make money … I would imagine that I'm going to have to warn them about that'. In his final address, the applicant's trial counsel confronted this concern head on, reminding the jury that it is 'not a court of morals'. In his charge, the trial judge provided a strong warning to the jury that they were not here 'to moralise as to that particular business model one way or the other'.

260 Second, the applicant's defence case in some respects could be characterised as weak (especially her defence that she may have believed the deposits had been paid). The prosecutor's argument that the falsity of the representations concerning the deposits must have been known to the applicant — given her experience and professional qualifications — was a cogent one, and may well have resonated with a jury.

261 These factors demanded real care 'be taken to ensure that the defence case is put by the trial judge fairly and in neutral terms'.[67]

262 Unfortunately, we are of the view that the pattern of attaching something akin to a prosecution rebuttal to these important defence arguments undermined the defence case, reinforced the impression that the trial judge entertained some scepticism about the defence case, and strengthened the appearance that the judge had aligned himself with the prosecution case.

263 In our view, they resulted in an unbalanced charge, which was a further irregularity in this trial.

264 We have already found that the judge's earlier interventions in the trial (especially during the prosecutor's opening) had created a risk of an appearance that he was aligned to the prosecution case. The unbalanced charge materially amplified that danger.

265 For completeness, we have considered some of the directions used by the trial judge which, on their face, were designed to militate the danger that the jury might defer to what appeared to be the judge's disapproval of the defence case:

(a) The trial judge emphasised to the jury that it was not his responsibility to decide this case; that this was their responsibility.

(b) The jury were properly directed that they must follow any directions of law given by his Honour, but that they were not bound by any comment he may make, and that they alone were the judges of fact.

(c) When the trial judge raised issues for them to consider, by rhetorical question or otherwise (including the impugned remarks considered above), he repeatedly

66*McKell v The Queen* (2019) 264 CLR 307, 319–20 [35] (Bell, Keane, Gordon and Edelman JJ); [2019] HCA 5.

67*Kayirici v R* [2021] NSWCCA 127, [160] (Ierace J, Hoeben CJ and Harrison J agreeing). See also *McKell v The Queen* (2019) 264 CLR 307, 322 [44] (Bell, Keane, Gordon and Edelman JJ); [2019] HCA 5; *R v FAV* [2019] QCA 299, [97] (Henry J).

emphasised that it was a 'matter for you'.

266 However, as the authorities make plain, the discretion to comment is one that should be exercised sparingly and only when necessary to do so. And, as the High Court observed in *McKell*, 'there is no little tension between suggesting to the jury what they "might think" about an aspect of the facts of a case and then directing them that they should feel free to ignore the suggestion if they think differently'.[68]

267 When regard is had to the purpose for which comments should be made — namely, to ensure the jury has a fair and accurate understanding of the facts in issue — the impugned comments simply should not have been made. Directions or qualifications, such as 'it's a matter for you', did not provide an antidote to the dangers created by the impugned remarks.

(d) The response of the applicant's trial counsel to the interjections and comments

268 The respondent makes the point that the applicant's trial counsel did not seek a discharge of the jury during or at the conclusion of the prosecutor's opening address.

269 Often enough, it can be said that the failure of defence counsel to object or take exception to an irregularity might evidence that the issue had assumed no significance in the trial.

270 We do not think that reasoning applies here, for several reasons.

271 First, the applicant's argument before us is that it is the cumulation of the judge's interventions and comments across the entirety of the trial which has caused this trial to miscarry.

272 Second, some allowance must be made for the fact that, when assessing the question of impermissible and excessive intervention, it is not easy to identify when a judge has 'crossed the line'. This is easier to assess with the benefit of seeing how the trial unfolded.

273 Third, and importantly, this is not a case where trial counsel failed to voice concerns about these issues:

(a) In response to a number of the judge's interventions, the applicant's trial counsel took exception, sometimes in strident terms. We have discussed these above.[69]

(b) On one such occasion, having observed that the trial judge had 'shown a degree of scepticism' about the defence during the trial, the applicant's trial counsel raised serious concerns at this being done in front of the jury.

(c) The applicant's trial counsel ultimately made an application to discharge the jury (albeit on narrower grounds, and in response to the judge's charge).

274 In our view, the responses of the applicant's trial counsel to the trial judge's interventions and comments, when considered as a whole, would suggest that this issue did assume some

68*McKell v The Queen* (2019) 264 CLR 307, 324–25 [50] (Bell, Keane, Gordon and Edelman JJ); [2019] HCA 5.

69That is, after the judge's interventions during his cross-examination of the witness Iva and during defence counsel's final address.

significance.

(12) Conclusion

275 While the applicant relies upon an accumulation of irregularities, the applicant's complaint under this ground is first anchored to the excessive interventions which occurred during the prosecutor's opening.

276 It seems to us that the damage caused by the judicial interventions and comments which occurred during the opening address was later compounded by further judicial interventions, and by the nature of the judge's charge.

277 As the authorities make clear, whether 'judicial intervention will constitute a substantial miscarriage of justice will always be a question of fact and degree'.[70]

278 Wherever the line is drawn between what may be acceptable intervention and comment by a trial judge to ensure a jury understands the issues in a case, and when a judge goes beyond the scope of permissible intervention and comment, we think it was crossed here.

279 We have concluded that there has been a series of irregularities in this trial, the cumulative effect of which has been to deny the applicant a fair trial, and to constitute a substantial miscarriage of justice.

280 At the oral hearing (but not in its written case), the respondent submitted that a conviction was inevitable. We disagree. Given the nature and extent of the irregularities, this is not a case where it is possible for this Court to be satisfied that conviction was inevitable.[71] The irregularities had the capacity to deflect the jury from giving fair and proper consideration to the proof of the prosecution case and to the multi-layered defences relied upon by the applicant (even if some defences were undoubtedly weak), and thus the real potential to affect the result of the trial.[72] Having considered the record of the trial, we cannot be satisfied, absent the series of irregularities, that the applicant's conviction was inevitable.

281 The applicant invited the court to enter an acquittal given that she has nearly completed her non-parole period. In our view, whether or not the applicant faces a new trial should be a matter for the Director. The time the applicant has already spent in custody under sentence will no doubt be a factor to be considered, along with others.

282 Finally, an observation.

283 This Court recently observed in *Nwagbo* that 'in criminal trials, judges ought be extremely

70*Nwagbo v The Queen* (2021) 288 A Crim R 516, 525, 525 [33] (Priest, Niall and T Forrest JJA); [2021] VSCA 93.

71*Awad v The Queen* (2022) 275 CLR 421, 432–435 [28]–[40] (Kiefel CJ and Gleeson J); [2022] HCA 36.

72*Awad v The Queen* (2022) 275 CLR 421, 453 [106] (Gordon and Edelman JJ); [2022] HCA 36.

cautious when intervening in evidence uninvited by any form of objection'.[73] The same judgment emphasised the virtues of judges exercising 'self-discipline and patience'.[74]

284 We would add that such care and restraint should also be exercised before judges intervene during counsels' addresses (opening or closing). This practice accords with the convention that trial judges should rarely interrupt counsel during an address in the presence of the jury. There are of course occasions during addresses which demand judicial intervention; where the jury has been misled on the facts, where counsel has made an error of law, or where counsel has otherwise transgressed. Such intervention should almost always take place in the absence of the jury.

PART D: GROUND 2

285 Under cover of ground 2, the applicant contends that:

> The guilty verdict on charge 1 was unreasonable or cannot be supported having regard to the evidence.

286 As can be seen, ground 2 is confined to charge 1. Whilst that may appear peculiar, it is the product of the way each charge was particularised. Unlike charges 2 to 7, charge 1 contained only a single particular — the preparation of a false payslip by Akkala, who was acting in concert with the applicant. That being the case, the prosecution could only secure a conviction on charge 1 if the jury accepted the argument that the applicant and Akkala had formed an agreement, arrangement or understanding to obtain a loan from ANZ by generating and submitting false payslips.

287 Unlike charges 2 to 7, where there is no way of knowing the precise basis (or bases) on which the jury returned verdicts of guilty, there is no doubt that, with respect to charge 1, the jury were satisfied that the applicant and Akkala were acting in concert. Accordingly, and no doubt cognisant of the need to preserve the integrity of the jury's verdicts, the applicant confined her challenge to charge 1.

(13) Parties' arguments

(a) The applicant

288 The applicant's argument on ground 2 hinges on the contention that, to return a verdict of guilty on charge 1, the jury necessarily had to be satisfied of the truthfulness of Akkala's account.

289 It was in that context that the applicant argued that the problems with Akkala's evidence were so insurmountable that no properly instructed jury acting reasonably could have been satisfied of her guilt beyond reasonable doubt.

290 In support of that contention, the applicant drew the Court's attention to a panoply of matters

73*Nwagbo v The Queen* (2021) 288 A Crim R 516, 560 [102] (Priest, Niall and T Forrest JJA); [2021] VSCA 93.

74*Nwagbo v The Queen* (2021) 288 A Crim R 516, 560 [102] (Priest, Niall and T Forrest JJA); [2021] VSCA 93.

which, in her submission, combined to render the verdict unreasonable. These included:

(a) Akkala's evidence was in direct conflict with the evidence given by Anand and another prosecution witness, Iva.

(b) Akkala's evidence was permeated by a series of internal inconsistencies, as well as instances of the giving of false evidence.

(c) There were a number of other inherent infirmities to Akkala's evidence. These included: his plea of guilty to dishonesty offences relating to his own involvement in fraudulently preparing 23 separate loan applications; his motive to co-operate with law enforcement authorities by implicating the applicant; his sentencing discount for undertaking to give evidence against the applicant; and his history of dishonesty-related offending.[75]

(d) Despite being a document heavy case, there was no documentary evidence to support the contention that the applicant was involved in the creation and provision of false payslips.

(b) The respondent

291 In reply to ground 2, the respondent conceded from the outset that the applicant had identified a number of inconsistencies between the evidence of Akkala and other witnesses at the trial, as well as inconsistencies between the evidence that Akkala gave at trial and prior statements made by him. The respondent also conceded the legitimacy of other matters identified by the applicant which were used to impugn Akkala's credit, although the respondent did suggest that, contrary to the applicant's submissions, certain inconsistencies identified by the applicant were not absolute or free from ambiguity.

292 However, the respondent contended that the applicant's approach on this application rose no higher than a re-agitation of the defence case at trial, which was plainly rejected by the jury.

293 On the issue of inconsistencies in Akkala's account, the respondent observed that Akkala was giving evidence in 2022 about events that occurred in 2014. Thus, what may appear at first blush to be 'direct inconsistencies' between the accounts given by witnesses may really be 'one of those things that one might expect with the passage of time'. In short, the respondent said that the inconsistencies go to the precise *details* about what occurred, not the elements of the offence charged.

294 The evidential context was also an important aspect of the respondent's argument. We will return to that during our analysis.

295 Relying on this Court's remarks in *Cavanaugh (a pseudonym) v The Queen*,[76] the respondent argued that the matters raised by the applicant did not present an obstacle to guilt. Rather, the jury was well-capable of assessing, and did assess (adversely to the applicant), the matters bearing upon Akkala's credibility and reliability. The respondent argued that none of the

75Including a prior conviction from 2009. That conviction involved Akkala defrauding the bank of Western Australia of over $310,000. He was sentenced to 3 years and 6 months' imprisonment in respect of that offending.

76[2021] VSCA 347.

matters relied upon by the applicant necessitated the jury having a reasonable doubt as to whether or not the applicant was a party to an agreement to submit fraudulent payslips to ANZ.

(14) Legal principles

296 It is fundamental to our system of adversarial justice that 'the jury be allowed to determine, by inference from its collective experience of ordinary affairs, whether and, in the case of conflict, what evidence is truthful'.[77]

297 This is a functional or 'constitutional' demarcation between the province of the jury and the province of the judge.[78] That being so, it is not the role of this Court to second-guess the jury's assessment of Akkala's reliability and credibility. On the contrary, we are 'required to assume that the jury concluded that the evidence of the relevant prosecution witness was credible'.[79]

298 This Court's task is to determine whether, 'notwithstanding that assessment — either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence — [we are] satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt'.[80]

299 By reference to those principles, our analysis proceeds on the footing that the jury accepted Akkala to be both reliable and credible. The question for us is whether, despite the jury's assessment in that regard, the other evidence at the trial — including, in particular, the evidence of 'competing witnesses'[81] — should have caused the jury to experience reasonable doubt.

300 This is a stringent standard.[82]

77*Doney v The Queen* (1990) 171 CLR 207, 214 (Deane, Dawson, Toohey, Gaudron and McHugh JJ); [1990] HCA 51.

78*Pell v The Queen* (2020) 268 CLR 123, 144–5 [38] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); [2020] HCA 12 (citations omitted).

79*Cavanaugh (a pseudonym) v The Queen* [2021] VSCA 347, [133) (Kaye JA). See also at [211] (Walker JA).

80*Pell v The Queen* (2020) 268 CLR 123, 144–5 [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); [2020] HCA 12 (citations omitted).

81*Cavanaugh (a pseudonym) v The Queen* [2021] VSCA 347, [216] (Walker JA).

82*Cavanaugh (a pseudonym) v The Queen* [2021] VSCA 347, [237] (Walker JA).

(15) Analysis

301 It became apparent at the oral hearing of this application that this ground is centred upon the conflicts between the evidence of Akkala and the witnesses Anand and Iva.[83] The conflicts with these other witnesses will also be the focal point of our analysis (whilst cognisant of the fact that the applicant's argument on this ground relies upon the cumulative effect of inconsistencies and deficiencies).

(a) The conflict between Akkala and the witnesses Anand and Iva

302 Akkala's evidence and Anand's evidence about the role which Anand played in processing the loan applications was generally consistent and uncontroversial. This included Akkala providing the payslips (which were in fact false) to Anand, which were then used to process the loan applications.

303 The conflict between their evidence arose in the following way.

304 Akkala gave evidence to the effect that:

(a) Akkala provided Anand three handwritten payslips provided to him (Akkala) by Iva.

(b) Anand contacted him and informed him (Akkala) that ANZ did not accept handwritten payslips; it was against the bank's policy.

(c) Anand sent Akkala a blank payslip template, which was in a form that ANZ would accept.

(d) Akkala initially said that Anand provided this template to him by an email (evidence in chief), but later said it was provided on a USB (cross-examination). The USB contained four templates.

(e) Akkala spoke with the applicant about the payslip problem, who told him to 'fix it'.

(f) The applicant told Akkala to populate the templates, supplied to him by Anand, with the information recorded in the handwritten payslips.

(g) The applicant told him (Akkala) that she would pay him to convert the handwritten payslips into a form that complied with ANZ's requirements.

(h) Akkala populated a number of templates with the information recorded in the handwritten payslips supplied by Iva. He then provided them to Anand on a USB key.

(i) Initially when questioned about his conversation(s) about whether he and Anand discussed the falsity of the payslips, Akkala's evidence was ambiguous.[84] Later in his evidence, Akkala confirmed he told Anand that the payslips were false.

83 Indeed, that is where most of the attention was also focused in her written case.

84 When asked whether he was talking with Anand about a series of false payslips, Akkala initially said that 'this conversation happened in 2014. I'm not sure what happened – what our conversation was back then'. When pressed, he said 'I did actually say that I don't recall the conversation, but you're insisting'.

305 Anand gave evidence to the effect that:

(a) Anand had no knowledge that any of the payslips were false.

(b) Anand never told Akkala that the payslips were inappropriate or insufficient or that he (Akkala) should go away and falsify a payslip.

(c) Anand was never given any handwritten payslips.

(d) Anand did not provide Akkala with a template for payslips, including any templates on a USB.

(e) Akkala never provided Anand with a USB containing any populated payslips.

(f) He did not have any conversations with Akkala about the falsity of the payslips.

306 There was thus a conflict essentially in relation to the issue of Anand's knowledge of the falsity of the payslips:

(a) on Akkala's account, Anand knew about the falsity of the payslips (and provided the templates to Akkala for the purpose of creating false payslips);

(b) whereas Anand denies this knowledge (and denies providing the templates).

307 To make good her submission that this conflict was effectively an obstacle to conviction, the applicant relied heavily on this Court's decision in *Spurritt v The Queen*.[85]

308 She argued that, like in *Spurritt*, the jury was presented with evidence in 'direct contradiction' to the evidence given by Akkala.

309 In support of this part of her argument, the applicant emphasised that no application was made by the prosecution to cross-examine Anand pursuant to s 38(1)(a) of the *Evidence Act 2008* ('*Evidence Act*') (on the basis that Anand's evidence was 'unfavourable').

310 In *Spurritt*, the prosecution had also not sought to challenge the evidence by making an application to cross-examine the witness under s 38 of the *Evidence Act*.

311 The applicant argued that Anand's evidence was in direct contradiction of Akkala's evidence, and was not evidence that could have reasonably been discounted or disregarded by the jury. That being so, it was not open to the jury to be satisfied of her guilt beyond reasonable doubt. Again, parallels are sought to be drawn with *Spurritt*.

312 The first point we would make is that not all conflicts between witnesses' accounts compel a conclusion that a conviction is unreasonable or cannot be supported by the evidence. It is the nature and quality of the conflict that is important.

313 In order to understand the significance of this conflict to the prosecution case, it is useful to recall what was in issue and how the prosecution put its case against the applicant.

314 The primary fact in issue on charge 1 was whether the applicant and Akkala were parties to an agreement to obtain financial advantage by deception by, relevantly, creating and using false payslips.

85 *Spurritt v The Queen* [2021] VSCA 7 ('*Spurritt*').

315 There was no dispute that the payslips provided to the ANZ were fraudulent.

316 Nor was there any dispute that Akkala was responsible for creating the payslips.

317 But there was a dispute about whether Akkala created them in furtherance of an agreement with the applicant, or on his own accord (to secure the loans for those persons referred to him by the applicant and, consequently, the associated commissions/fees).

318 The only evidence of that agreement between Akkala and the applicant came from Akkala. This evidence encompassed conversation(s) Akkala said he had with the applicant (where no one else was present).

319 Importantly, the prosecution's case that Akkala was acting in furtherance of an agreement he had with the applicant to forge and use the payslips did not depend upon the evidence of Anand. Still less did it depend upon the jury's acceptance of Akkala's evidence that Anand knew of the falsity of the payslips (and provided the templates).

320 In short, the question of the applicant's complicity with Akkala did not turn upon the jury's resolution of the conflict relating to the criminal involvement of Anand in the forgery of the payslips.

321 This conflict was essentially a credit issue.

322 This case can be contrasted with *Spurritt*. *Spurritt* involved historical sexual offending by a teacher in a classroom against pupils. In that case, the complainant gave evidence that he was sitting in a two-seater desk next to a close friend. He said that when the applicant placed his hand over his shorts and on top of his penis, he looked at the friend, and the friend looked at him, and they both rolled their eyes. He said that subsequently he and the friend discussed the incident and they considered that what their teacher had done was not appropriate. The complainant further stated that the same conduct occurred on a number of other occasions when the friend was sitting next to him, and that on the other occasions he had spoken with the friend about it.

323 On the other hand, the friend, in his evidence, stated that he did not witness any such incident and he had never discussed any such incident with the complainant. The friend consistently stated that he had not seen any untoward conduct by the applicant to the complainant.

324 The evidence of the friend was never challenged by the prosecution. As we have said, no application was made by the prosecution to cross-examine him under s 38 of the *Evidence Act.*

325 As the court found in *Spurritt*:

(a) The friend was 'a direct eye-witness'[86] to the charged incident and to a number of other incidents alleged by the complainant.

(b) The evidence of the friend was 'in direct contradiction of the evidence given by [the complainant] in relation to the charged incident and in respect to the other uncharged acts'.[87]

86*Spurritt v The Queen* [2021] VSCA 7, [90].

87*Spurritt v The Queen* [2021] VSCA 7, [98].

(c) In those circumstances, the conflict in the evidence between the complainant and the friend, concerning the charged and uncharged incidents was such that the jury, acting reasonably, must have had a reasonable doubt about the reliability of the evidence of the complainant concerning the incident that was the subject of the charge.[88]

326 The conflict in *Spurritt* was thus central to a consideration of the ultimate fact in issue (i.e. whether sexual act(s) occurred). The account given by the friend, if it were accepted, was exculpatory. Left unchallenged, it was a roadblock to a pathway to conviction.

327 The conflict in the case at hand is of a different character than the conflict in *Spurritt*. In contrast with *Spurritt*:

(a) Anand's evidence (including that which conflicted with Akkala's evidence) had no real bearing upon the conduct relied upon by the prosecution to prove the complicity of the applicant. That conduct, as we have said, comprised discussion(s) between (only) Akkala and the applicant about the fabrication of payslips.

(b) On any view, Anand was not a 'direct eye witness' to any conduct relied upon to prove the complicity of the applicant.

(c) Likewise, Anand's evidence was not in direct contradiction of the evidence given by Akkala on any matter concerning the complicity with the applicant.

328 Much is made by the applicant that the prosecution failed to make any application to cross-examine Anand. This could, the applicant says, have been made upon the basis that Anand's evidence was 'unfavourable' to the prosecution case for the purposes of s 38 of the *Evidence Act*. In our view, the account given by Anand, even if it were accepted, is not exculpatory. It may be doubted that it is even relevantly 'unfavourable'. The conflict was peripheral to the resolution of the principal fact in issue. In any event, it was certainly nothing approaching a roadblock, and did not compel the jury to entertain a reasonable doubt.

329 This was essentially a credit issue, and the jury was well placed to assess the significance of the conflict.

330 Other differences in the accounts — such as whether something was provided by way of email or USB — were differences in detail, and might be considered not to be matters of any significance.

331 Iva's evidence also differed from Akkala's evidence in relation to the *handwritten* payslips provided by Iva.

332 Iva said that he never gave Akkala handwritten payslips; he only gave him typed, genuine ones.

333 In cross-examination, Akkala agreed that the receipt of handwritten payslips from Iva was the 'genesis' of him having a conversation with Anand about the insufficiency of the payslips and, subsequently, a discussion — the *first* discussion — with the applicant about creating false payslips.

334 When combined with Anand's evidence about the templates, the applicant's trial counsel argued in closing that, in circumstances where Akkala and Iva's evidence on the question of handwritten payslips was in conflict, the 'story about how all this started is a complete work

88 *Spurritt v The Queen* [2021] VSCA 7, [99].

of fiction'. The applicant's trial counsel argued that Akkala had concocted a version of events in an effort to implicate the applicant (and Anand) in the offending, thereby securing himself a more favourable sentencing outcome.

335 The applicant's argument was echoed on this application. Iva was, in the applicant's submission, a competing witness whose testimony presented an obstacle to conviction.

336 It must readily be accepted that there were discrepancies — indeed, direct conflicts — between the account given by Akkala and the account given by Iva. Nevertheless, the issue was fully ventilated at trial. Further, as we have said above, attention must focus upon the significance or materiality of the conflict.

337 Bearing in mind that the primary fact in issue on charge 1 was whether the applicant and Akkala were parties to an agreement to obtain financial advantage by deception by, relevantly, creating false payslips, there are some fundamental difficulties with the applicant's submissions.

338 *First*, it does not address the fact that Iva's evidence (even when combined with Anand's evidence) is not inconsistent with the proposition that the applicant and Akkala were parties to an agreement that encompassed the production of false payslips. The fact that the payslips were genuine and typed, as opposed to being handwritten, says nothing about the existence of an agreement. Akkala's essential account never changed; he was unwavering in his assertion that the applicant asked him to prepare false payslips.

339 *Second*, the applicant's argument does not pay sufficient regard to the need to look at this issue by reference to the evidence as a whole. As the respondent submits, the prosecution alleged that the applicant and Akkala had effected a scheme to secure home loans for their clients. This is not a case where the prosecution alleged the existence of several separate agreements, each entered into at different times. There was but one agreement; it was a continuing one, which was implemented each time a false payslip was created.

340 Approached in this way, the events surrounding charge 2 have some relevance. At trial, the prosecution argued that the applicant was aware that Leiataua (a student with no meaningful income) was impecunious and did not have the means to service a home loan. Despite that knowledge (and her experience as a real estate agent), the applicant was alleged to have arranged for Leiataua to apply for one, with Akkala's assistance. This, the prosecution argued, necessarily entailed the creation of a false payslip. It is in this context that the respondent contends that it was well open to the jury to infer that the agreement was formed at an earlier time — specifically, at or around the time the application the subject of charge 1 was submitted to ANZ. The respondent's submission is a cogent one, and the jury was entitled to take it into account.

341 As earlier observed, this Court must proceed on the basis that the jury were satisfied that Akkala was a reliable and credible witness, at least on the issues going to the points of proof. The question for us is whether, despite the jury's acceptance of Akkala's account, improbabilities arise by reason of aspects of Iva's evidence (viewed in the light of what was said by Anand) that compel the conclusion that the jury *must* have entertained a reasonable doubt in respect of charge 1. We are not so satisfied.

(b) Internal inconsistencies and false evidence

342 The applicant, in her written case, also argued there were a number of internal inconsistencies in the evidence of Akkala, and that he gave false evidence.

343 We agree with the submission of the respondent that these inconsistencies were fully exposed for the jury's consideration, first through cross-examination, and later through the applicant's trial counsel's arguments in his final address. Further, the trial judge spent some time in his charge identifying the asserted inconsistencies. The trial judge then directed the jury as to how they could use prior inconsistent statements.

344 The jury was well placed to consider these matters — that is, whether there were inconsistencies and, if so, their significance. We proceed upon the footing that they did so.

345 It is to be remembered that these events dated back to 2014. Akkala was recounting his recollection of events and transactions which occurred over many months. Differences, inconsistencies and deficiencies as to detail is unremarkable. The jury could evaluate their importance.

346 We will specifically address the two examples highlighted by the applicant in her written case.

347 The applicant relies upon her claim that Akkala gave false evidence about his motivation for making his witness statement to police. This argument contains an assumption that Akkala gave false evidence.

348 When being cross-examined before the jury, Akkala did not accept the proposition that, when making his police statement, he was motivated to assist the prosecution.

349 It was put to him that at a preliminary hearing he had given evidence agreeing that he made the police statement to secure a reduction in his sentence. It was then suggested that this was inconsistent with his evidence before the jury.

350 While not free from ambiguity, one way in which to read Akkala's evidence is as follows:

(a) He maintained that what he had said at the preliminary hearing was the truth.

(b) He accepted he had understood his sentence reduction was conditional upon the making of his police statement and the entry of his plea of guilty. In this way, he accepted that his motivation in making the police statement was to minimise his sentence.

(c) But he took issue with what he perceived to be the import of the cross-examination; namely, that he was somehow motivated to say things in the statement which were of value or use to the prosecution in its case against the applicant, as distinct from simply giving his truthful and accurate account as to what happened.

351 The jury was well placed to assess this evidence.

352 We have not been persuaded that the jury had to accept that Akkala gave false evidence, let alone that his evidence in this respect demanded that the jury entertain a reasonable doubt about the applicant's guilt in relation to charge 1.

353 The other example underlined by the applicant relates to an alleged inconsistency in his evidence about when he received payment and the purposes of that payment.

354 Akkala gave evidence in chief that, in addition to a loan introducer's or brokerage fee, he received payment at settlement for creating the false payslips.

355 The defence cross-examined Akkala about evidence which he gave at the preliminary hearing. Akkala had given evidence to the effect that he had been paid for legitimate work; he also gave evidence that there was no linkage between the payments for that legitimate work and his work in relation to the falsification of documents. Akkala accepted he had given this evidence at the preliminary hearing.

356 The defence then put to Akkala that his evidence in chief (before the jury), that his fees were being paid to falsify documents, is 'patently false'.

357 Akkala disagreed. He then gave an explanation to the effect that he did a lot of legitimate work in facilitating these transactions, which went beyond falsifying documents. The import of his answer seems to be that he got paid for this legitimate work, and this is his explanation for his previous evidence (that there was no linkage between the payments for that legitimate work and his work in relation to the falsification of documents).

358 It was open to the jury to accept the gist of the explanation which the witness gave. The state of the evidence was not such as to necessitate a conclusion that the witness had given false evidence. It may be accepted that the state of the evidence on the issue of payments was ambiguous; even so, this did not require the jury to experience a reasonable doubt about the applicant's complicity in the fabrication of the payslips. There was no ambiguity about his account that he had an understanding with the applicant to fabricate the payslips.

(c) Other infirmities

359 The applicant's points relating to Akkala's sentencing discount for these offences upon the basis of his undertaking to give evidence against the applicant, his consequential motive to co-operate with law enforcement authorities by implicating the applicant, and his criminal history, can be addressed compendiously.

360 These were all matters which went to Akkala's credit, and the jury can be taken to have considered each of them.

361 The judge gave the jury an unreliable evidence warning, in orthodox terms, warning them about the potential unreliability of Akkala's evidence and requiring them to take the warning into account.

362 The judge also gave them a bad character direction in relation to Akkala.

363 The jury can be assumed to have applied those directions.

364 These assessments were quintessentially for the jury to weigh up. Having applied these directions, they found Akkala to be credible and reliable, as they were entitled to do.

(d) Absence of documentary evidence

365 The applicant points to the fact that despite the case being document heavy, 'there was not a single document, email or payslip that could be produced by the prosecution in support of Akkala's evidence about the applicant's involvement in the creation and provision of false payslips'.

366 This point is not a persuasive one:

(a) On Akkala's account, he agreed, at the applicant's *verbal* direction, to fabricate the false payslips. On Akkala's account the applicant otherwise played no active role in

the forgeries.

(b) On Akkala's account, the verbal discussions he had with the applicant were sufficient in order for him to implement this criminal scheme.

(c) The creation of any such documentation was not necessary to give effect to this wrongdoing.

(d) It is unremarkable in the circumstances that there are no documents in existence which implicate the applicant in the falsification of the payslips.

367 The absence of such supporting documentary evidence does not add force to the contended conclusion that the verdict of the jury was not open.

(16) Conclusion

368 We considered each of the matters relied upon by the applicant, and the evidence led at the trial. We were not satisfied that any of the matters, alone or in combination, renders the verdict on charge 1 unreasonable or not supported by the evidence.

369 In light of our analysis, leave to appeal on ground 2 was refused.

PART E: ORDERS

370 For the foregoing reasons, we granted leave to appeal against conviction on ground 1; allowed the appeal; set aside the convictions; and ordered that there be a new trial.

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